University of Pennsylvania
Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 145 DECEMBER 1996 NO. 2

ARTICLES

THE CASE AGAINST POSTMODERN CENSORSHIP THEORY

STEVEN G. GEY†

INTRODUCTION

It is an unfortunate sign of our ambiguous times that the First Amendment's free speech protection no longer commands universal support among progressive constitutional scholars and legal activists. The political and legal circles that only a decade ago could be counted upon to defend First Amendment values are now increasingly willing to qualify their support for free speech, if not to abandon the cause altogether. Critical race theorists, feminists of the MacKinnon school and civic republicans have, each in their own ways, attacked the old-fashioned left-liberal fixation on the First Amendment and the quaint, if not antiquarian notions of intellectual freedom that the Amendment represents. Thus, old-line free speech litigation organizations such as the American Civil Liberties Union ("ACLU") have become the targets not just of conservative politi-

† John W. and Ashley E. Frost Professor of Law, Florida State University College of Law.

cians, but also of the new progressives, who deride the ACLU for being "a handmaiden of the pornographers, the Nazis and the Ku Klux Klan"[1] because of its insistence on representing the free speech rights of those groups.

The anti-free-speech trend has advanced to the point that progressive critics of the First Amendment have begun to claim victory over relativistic liberalism. Richard Delgado announced not long ago that

> the ground itself is shifting. The prevailing First Amendment paradigm is undergoing a slow, inexorable transformation. We are witnessing the arrival, nearly seventy years after its appearance in other areas of law, of *First Amendment legal realism.* The old, formalist view of speech as a near-perfect instrument for testing ideas and promoting social progress is passing into history. Replacing it is a much more nuanced, skeptical, and realistic view of what speech can do, one that looks to self- and class interest, linguistic science, politics, and other tools of the realist approach to understand how expression functions in our political system.[2]

Like most progressive opponents of a strong First Amendment, Delgado assures us that this new way of looking at free speech represents an evolutionary advance over the previous intellectual model. "We are losing our innocence about the First Amendment," Delgado writes, "but we will all be wiser, not to mention more humane, when that process is complete."[3]

First Amendment critics such as Delgado see a new era dawning, in which free speech will lose the aura it has developed over the years and will be put into proper perspective as merely one constitutional value among many other equally important values. The immediate consequence of this approach is that the First Amendment could be trumped by other values whenever the government could reasonably claim that speech must be suppressed in furtherance of some other important social goal. Unlike previous censorship regimes, which previous generations of political and legal progressives thought served the interests of wealth and power, this new, postmodern censorship is presented as serving goodness,

---

[1] Andrea Dworkin, *The ACLU: Bait and Switch*, 1 YALE J.L. & FEMINISM 37, 37 (1989).

[2] Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 170 (1994) (footnotes omitted).

[3] *Id.*

equality and truth. The new critics proffer censorship with a human face.

Delgado is hardly alone in heralding this brave new First Amendment world. Variations of his position have become commonplace among progressive law professors and students, although not yet significantly among members of the practicing bar and judges. The incessant theoretical devaluation of the First Amendment by progressive scholars has put many of the remaining academic supporters of strong free speech protection on the defensive. For example, Kathleen Sullivan has recently attempted to defend First Amendment values against progressive attacks generated by what she terms the "free speech wars."[4] Sullivan rejects the prescription for more speech regulation, but gives considerable deference to the claims of those who propose to reduce significantly First Amendment protections. "The new speech regulators demand a response from those who would leave speech mostly deregulated; and they deserve a response that goes beyond the rote and reflexive invocation of free speech as an article of faith."[5] Sullivan argues that the old defenses of free speech are no longer sufficient, and that new defenses must be devised "for those in my generation whose respect for the new speech regulators' insights does not extend to agreement with their proposed solutions."[6]

In this Article, I join Sullivan in rejecting the solutions of the postmodern censors. I will argue, however, that she has given the claims of the new regulators too much credit. The theoretical advances celebrated by Delgado and other progressive critics of the First Amendment are not really advances at all. They are simply refurbished versions of arguments used since the beginning of modern First Amendment jurisprudence to justify government authority to control the speech (and thought) of citizens. The fact that these arguments are now being used in the service of different social and political ends cannot cloak the fact that the underlying theories are the same ones that justified the prosecutions of antiwar protesters, socialists and anarchists in the early years of this century.[7]

---

[4] Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 213 (1994) (warning that "appeal to the First Amendment as self-evident truth" may not be effective against the "new speech regulators").

[5] *Id.*

[6] *Id.* at 214.

[7] The clearest example of this theoretical convergence is Justice Sanford's majority opinion in *Gitlow v. New York*, 268 U.S. 652, 667-71 (1925), which upheld the "criminal anarchy" convictions of socialists under a theory of social constructionism similar to

Moreover, despite the different objectives of the new censors, their reasons for supporting government control over speech are not significantly different from those of their reactionary predecessors. Both the new and the old censors fear political radicalism and its supposed attractiveness for the masses; both seek to implement an elitist system of value development, under which individuals will receive constant guidance from an enlightened government on the subject of public morality; and both insist that the principles of free speech should be treated as indistinguishable from the often dangerous or despicable principles of those who enjoy its protection. Thus, both the new and the old censors use prejudice against a practitioner of speech (communists, anarchists and conscientious objectors in the old days, "pornographers, the Nazis and the Ku Klux Klan"[8] today) to justify opposition to the principles that allow disfavored speakers to gain access to the public's eyes and ears.

This Article assesses several major components of the "new" progressive theories of censorship and details the similarities between these new theories and earlier ones. The Article also addresses the obvious consequence of this analysis: Just as the new arguments *for* censorship track the old justifications, the old arguments *against* censorship—tracing back to Milton, Mill, Holmes and Brandeis—remain responsive to the flaws of any theoretical system in which government is empowered to regulate speech and thought.

This Article is structured around what Sullivan has identified as the three cornerstones of postmodern censorship theory. Thus, Part I is devoted to the postmodern theory of social constructionism, Part II addresses the postmodernists' rejection of the public/private distinction, and Part III discusses postmodern egalitarianism.[9] In each of these parts, I will address the corresponding arguments of three main branches of postmodern censorship theory: critical race theory, represented by Richard Delgado, Mari Matsuda and Charles Lawrence; civic republicanism, focusing especially on the work of Cass Sunstein; and the branch of feminism usually associated with the writings of Catharine MacKinnon.[10] Specific problems with the

---

that of the postmodernists. *See also* Schenck v. United States, 249 U.S. 47 (1919) (upholding the convictions of antiwar activists); Debs v. United States, 249 U.S. 211 (1919) (same). For further discussion of this point, see *infra* Part I.D.

[8] Dworkin, *supra* note 1, at 37.

[9] *See* Sullivan, *supra* note 4, at 209-13. Sullivan uses the term "Legal Realism" to describe the second component, noting that this is one of the primary sources of the modern arguments against the public/private distinction. *Id.* at 211.

[10] I should acknowledge at the outset of this Article that the labels I use to group

various forms of postmodern censorship theory will be detailed at length below, but the critique that follows is oriented around a consistent theme: The postmodern censorship theory offered by this new generation of politically progressive legal scholars is neither progressive nor, for that matter, even "postmodern." In the end, it is just censorship.

---

different theorists are inaccurate to the extent that they suggest a complete uniformity of views on the subject of free speech by all those who identify themselves with a particular school of thought. This is especially true of the term "feminism," since there is a large, diverse and vibrant body of literature written by feminists who vigorously disavow efforts to censor speech even in the ostensible service of goals such as sexual equality. *See, e.g.*, Kate Ellis, *Introduction* to CAUGHT LOOKING: FEMINISM, PORNOGRAPHY & CENSORSHIP 6 (Kate Ellis et al. eds., 1986) ("In putting out this booklet, we are expressing our belief that the feminist movement must not be drawn, in the name of protecting women, into the practice of censoring 'deviant' sexual representation or expression."); Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality, in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 7 (Carole S. Vance ed., 1984) ("We cannot create a body of knowledge that is true to women's lives, if sexual pleasure cannot be spoken about safely, honestly, and completely."); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 13 (1995) (chastising "MacDworkinites" and "pornophobic feminists" for embracing the "quick fix" of censorship); Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in* American Booksellers Ass'n v. Hudnut, 21 U. MICH. J.L. REFORM 69, 69 n.1 (1987-1988) (arguing for the unconstitutionality of an Indianapolis antipornography ordinance, which defined pornography as "the sexually explicit subjugation of women"); Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1100 (1994) (suggesting that the movement to suppress pornographic imagery is "inimical to feminist ideological and political goals"). Likewise, there are proponents of civic republicanism who argue that a proper interpretation of the theory would not support censorship efforts such as university speech codes. *See, e.g.*, Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 938-944 (1991) (attacking hate speech regulations as illegitimate and futile attempts to coerce civic virtue). As to the third group of postmodern censors, however, there seems to be a general consensus among the most prominent critical race theorists favoring the regulation of speech in order to further the goal of greater racial equality. While recognizing that there are differences on the subject of free speech among theorists who align themselves generally with the theoretical schools identified in this Article, I shall, in the interest of efficiency, use the labels of the various groups with the understanding that, for the purposes of this Article, terms such as "feminism" and "civic republicanism" refer only to the branches of those theoretical schools that favor censorship of speech on the grounds discussed below.

I. POSTMODERN CENSORSHIP AND SOCIAL CONSTRUCTIONISM

The social constructionist argument is perhaps the clearest thread linking the various groups proposing new theories to justify speech regulation. Some version of this motif is the centerpiece of critical race, civic republican and feminist treatments of free speech. Although each group emphasizes different factors, the central argument is the same: Everyone in society is "constructed" by his or her society; antisocial individual behavior will occur as a direct result of the socialization that an individual experiences in his or her everyday life; such behavior cannot effectively be controlled solely through the application of disincentives or postbehavior punishments for illegal action; therefore, factors contributing to individual socialization must be subject to governmental control in order for the government adequately to protect every citizen's full participation in the society's social and political life.

The details emphasized by the different procensorship factions merely flesh out the central components of the argument by relating the claims concerning adverse socialization to the particular experiences of specific groups. These details bear out that the postmodern censors are true radicals in the sense that they define the world in a way that is contrary to the common understanding of those outside their ideological fold. The postmodern censors are also deeply conservative, however, in that they would reinstitute a degree of government control over speech and thought that has been unknown since World War II—and they would do so precisely so that the government could mold political reality to its own liking. Thus, the instincts of the postmodern censors do not reflect the deeply antigovernment biases of the radical anarchists, conscientious objectors and antiwar (and thus necessarily antigovernment) left-wing radicals of the early twentieth century. Ironically, the new censors have instincts about speech and behavior that track the rigid, hierarchical and deeply reactionary predilections of the government that fought hard to silence earlier generations of radicals. Thus, the postmodern position on censorship is "radical" only in its deviation from what has become the constitutional norm, not in its alignment with earlier manifestations of the political left.

A. *Constructing Evil: Racism*

The postmodern censors believe that oppressive speech must be controlled by the government not only because antisocial speech creates the reality of oppression, but because antisocial speech *is* the oppressive reality in a more meaningful sense than the various physical manifestations of that oppression. The postmodernists view manifestations of oppression such as discrimination in housing or education as less intractable than the ideology of racism or sexism that provides the inspiration and justification for such discrimination. A prominent example of this approach is Professor Charles Lawrence's interpretation of *Brown v. Board of Education*.[11] Lawrence, a critical race theorist and a proponent of Stanford University's speech code, has written at length about his interpretation of *Brown*, which he interprets through the prism of social constructionism.

According to Lawrence, *Brown* is "[a] [c]ase [a]bout [r]egulating [r]acist [s]peech."[12] He argues that "[t]he key to this understanding of *Brown* is that the practice of segregation . . . was *speech*. . . . *Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children."[13] Lawrence cites language in Chief Justice Warren's *Brown* opinion concerning the stigma that segregation attached to black students in segregated schools: "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[14] Lawrence argues that the *Brown* decision was concerned primarily with eliminating the stigmatizing message of racism that was conveyed by the system of segregated education. He then argues that since the Court itself removed racist messages (in the form of segregation) from the protection of the First Amendment, the Court should not stand in the way of other government efforts to eliminate similar racist messages in the form of private speech. He concludes that "*Brown* and the anti-discrimination law it spawned provide precedent for the position that the content regulation of racist

---

[11] 347 U.S. 483 (1954).

[12] Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438.

[13] *Id.* at 439.

[14] *Brown*, 347 U.S. at 494.

speech is not only permissible but may be required by the Constitution in certain circumstances."[15]

The alternative, and far more common, explanation of *Brown* is that the Court held segregated public schools unconstitutional primarily because such schools provided black children with a measurably inferior education than that which they provided to white students. This interpretation maintains that the Court was concerned not so much with the message of segregation as with the mechanisms of segregation and the concrete effects such mechanisms had on the lives of black children. The actual holding of the case, after all, is that "[s]eparate educational facilities are inherently unequal."[16] According to this interpretation, the "feeling of inferiority"[17] to which Chief Justice Warren referred is relevant in that it contributes in specific ways to the concrete reality of segregation, most directly by making it harder for black children to achieve the same level of educational attainment as the more privileged white children.[18] Under this interpretation, *Brown* was primarily directed at eliminating every manifestation of government-enforced educational, political and social ostracism; the Court assumed that eliminating these concrete effects would also diminish the force of the ideological racism that justified segregation.

Lawrence's primary focus on the message of racism, rather than racism's concrete manifestations, reflects his view that "all racist speech constructs the social reality that constrains the liberty of nonwhites because of their race."[19] Contrary to the common interpretation of *Brown*, Lawrence argues that eliminating the physical manifestations of racism will be futile if the ideology of racism is not eradicated. He argues that in the absence of this broader attack, racism will continue to exert its overriding influence on the lives of those targeted by racism, in even more subtle and insidious ways than did the overt segregation addressed in *Brown*. Lawrence adopts the position of Professor Kendall Thomas that race is a social construc-

---

[15] Lawrence, *supra* note 12, at 449.

[16] *Brown*, 347 U.S. at 495.

[17] *Id.* at 494.

[18] The Court supported its linkage of stigma to educational attainment by citing several sociological studies in footnote 11. *See id.* at 494-95 n.11. Although much maligned at the time by the opponents of *Brown*, the Court's conclusions about the effects of segregation on the education of black students have been reaffirmed by subsequent studies. *See* William L. Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1705-07 (1986) (reporting significant improvements in blacks' educational attainment since *Brown*).

[19] Lawrence, *supra* note 12, at 444.

tion. Lawrence argues that race is "derived through a history of acted-upon ideology" and that "the cultural meaning of race continues to be promulgated through millions of ongoing contemporaneous speech/acts."[20] One consequence of this ongoing social construction of race, according to Lawrence, is the perpetuation of an almost insuperable structural racism: "We simply do not see most racist conduct because we experience a world in which whites are supreme as simply 'the world.'"[21] In Delgado's phrasing of the same point, "[i]ncessant depiction of a group as lazy, stupid, and hypersexual—or ornamental for that matter—constructs social reality so that members of that group are always one-down."[22]

Like other manifestations of the social constructionism argument, critical race theorists use social constructionism to attack the concept of a "marketplace of ideas," which they view as an indispensable element of any First Amendment jurisprudence that provides broad protection of free speech. The critique of the marketplace metaphor offered by Lawrence and Delgado represents a view that is prevalent, if not universal, among critical race scholars. In sum, their argument is that the "marketplace of ideas" metaphor is an inappropriate guidepost for First Amendment jurisprudence because the intellectual "market" will never be free. The market is not free, the argument asserts, because all discussions about social or political policies will be carried out within what Delgado calls the "reigning paradigm, the set of meanings and conventions by which we construct and interpret reality."[23] Within this paradigm, "[s]omeone who speaks out against the racism of his or her day is seen as extreme, political, or incoherent."[24] Many potential "sellers" and "consumers" will be excluded from the marketplace altogether: "[C]ommunication is expensive, so the poor are often excluded; the dominant paradigm renders certain ideas unsayable or incomprehensible; and our system of ideas and images constructs certain people so that they have little credibility in the eyes of listeners."[25] Thus, critical race theorists

---

[20] *Id.* at 443 n.52.

[21] *Id.* at 443.

[22] Delgado, *supra* note 2, at 171-72.

[23] *Id.* at 171.

[24] *Id.*

[25] *Id.* Lawrence expresses a similar view:

> Just as the defect of prejudice blinds the white voter to interests that overlap with those of vilified minorities, it also blinds him to the "truth" of an idea or the efficacy of solutions associated with that vilified group. And just as prejudice causes the governmental decisionmakers to misapprehend the

argue that the outcome of any competition among ideas is foreordained: "The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade."[26]

Although this is not the place for a comprehensive defense of Holmes's metaphor, I believe that critical race theorists (and other postmodern censors) have greatly overestimated the significance of the metaphor in defining the rules of First Amendment jurisprudence, which treats speech as important in itself, regardless of the speech's market value or consumer popularity. Indeed, the postmodern censors have probably misconstrued the basic meaning of the marketplace-of-ideas concept.[27] For present purposes, however, Lawrence's and Delgado's arguments against the marketplace of ideas underscore how radically the postmodern censors would revamp not only First Amendment law, but also our most basic notions of citizenship in the American democratic state.

What most offends critical race theorists about the marketplace-of-ideas metaphor is its presumption that the intellectual "consumers" in the marketplace are free actors, capable of intelligently and fairly considering competing political ideas, policy proposals and value systems before forming conclusions of their own about the direction in which the country and its government should move. According to critical race theorists, such freedom is not possible because the "consumers" in the marketplace of ideas are so infused with the received values of a corrupt system that they cannot possibly exercise independent judgment about the ideas that come into the market. Most prejudice is unconscious, Lawrence notes, and "just as prejudice causes the governmental decisionmakers to misapprehend the costs and benefits of their actions, it also causes all of us to misapprehend the value of ideas in the market. . . . [W]hen an

---

> costs and benefits of their actions, it also causes all of us to misapprehend the value of ideas in the market.

Lawrence, *supra* note 12, at 470 (footnote omitted).

[26] Lawrence, *supra* note 12, at 468.

[27] For a recent contribution to the marketplace-of-ideas literature, see Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949 (1995). Sullivan notes that, unlike the production of regular commodities, speech is not valued primarily as a proprietary activity. Rather, speech is valued "independent of people's willingness to pay for it." *Id.* at 963.

individual is unaware of his prejudice, neither reason nor moral persuasion will likely succeed."[28]

From the perspective of the critical race theorists, there is no easy way to solve this problem: the marketplace of ideas is irrevocably flawed so long as the participants in the market are indoctrinated by a racist culture. Thus, the psychology of the market participants must be changed before the marketplace can operate. Professor Mari Matsuda, another prominent critical race theorist, has provided one rationale for this response to the market distortion problem:

> As we learn more about the compulsive/psychosocial aspects of racism, we may come to see how allowing the racist speaker to fall into an accelerating upward spiral of racist behavior is akin to letting a disease go untreated. The paternalistic ring of the disease model causes dis-ease given our knowledge of the harm done under that model to innocent nonconformists, the weak, the poor, women, and children. On the other hand, extreme libertarian individualism denies the racists the opportunity to know what life might be like if their escalating racism were to be restrained.[29]

Although Matsuda is referring specifically to a racist speaker in this passage, it seems that the same "disease model" must be applied to everyone in society, given Matsuda's comment that "at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth."[30] Like Matsuda, other critical race theorists heavily emphasize the distorting effects of unconscious racism. We are all infected; the infection badly clouds our judgment, and therefore, we must be cured of the disease that taints our political and social perspectives before being allowed to participate fully in our own self-governance.

Matsuda's emphasis on the need for an ideological "cure" for unconscious prejudice underscores the comprehensive nature of the proposals generated by critical race theorists in response to their views on social constructionism. Because of racist social conditioning, individuals are presently incapable of thinking for themselves about matters involving race. Thus, wholesale re-education of the populace is necessary before we can even begin to consider a system of unfettered free speech. When critical race theorists advocate

---

[28] Lawrence, *supra* note 12, at 470.

[29] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2340 n.101 (1989).

[30] *Id.* at 2339.

government-enforced suppression of racist speech (a term that certainly includes overtly racist epithets, but as a matter of logical necessity also has to include many other forms of discourse that convey demeaning or unflattering messages about a racial group[31]), they are not merely seeking to protect the status and sensibilities of minority-group members who are the targets of that speech. Rather, they are also seeking to replace one "reigning paradigm" with another. They are seeking to reconfigure the now-flawed intellectual marketplace by excising from the market an entire set of ideas, so that those ideas cannot once again infect the citizenry with the disease of racism.

Thus, critical race theorists do not propose to eliminate the distortions they find in the marketplace; on the contrary, they propose to distort the market intentionally in a different way. One set of ideas will be favored over another, as critical race theorists argue is presently the case. But even accepting the critical race theorists' view that one particular set of ideas currently serves as a "reigning paradigm" governing society,[32] there is still a crucial

---

[31] One wonders, for example, whether notorious recent books like *The Bell Curve* or *The End of Racism* would be candidates for suppression under a system governed by critical race principles of social construction. *See* DINESH D'SOUZA, THE END OF RACISM 245-87, 477-524 (1995) (defending "rational discrimination" and arguing that dysfunctional black culture, rather than racism, accounts for economic disparities between whites and blacks); RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE 269-70, 389 (1994) (arguing that disparities between I.Q. scores of racial groups may be hereditary and not subject to correction by environmental interventions). Both books have been denounced as racist. *See, e.g.*, Elaine R. Jones, *Higher Learning*, ESSENCE, Apr. 1995, at 128, 128 (describing *The Bell Curve* as "racist pseudoscience"); Jack E. White, *The Bigot's Handbook*, TIME, Oct. 2, 1995, at 87, 87 (quoting Robert Woodson's characterization of *The End of Racism* as espousing a "racist ideology"). The contributions of such "legitimate" books to the social construction of a racist culture should concern critical race theorists far more than the barely coherent racist rantings of cultural outsiders such as Klansmen and skinheads. But if the ideas of Herrnstein, Murray and D'Souza pose a greater threat to the proper social construction of race than the ideas of the Klan, and if critical race theorists clearly would permit the censorship of the Klan's racist expressions, then critical race theorists logically should also favor the censorship of the ideas of Herrnstein, Murray and D'Souza. I hasten to add that although I vehemently disagree with the theories espoused by Herrnstein, Murray and D'Souza, the basic theme of this Article is that my views on the subject (or anyone else's) should never justify censorship of expressive materials such as these. The point here is simply that the critical race theorists' censorship proposals potentially have far greater implications for debate about social policy than is obvious from their usual focus on loud-mouthed miscreants.

[32] For example:

> [I]t is not just the prevalence and strength of the idea of racism that makes [sic] the unregulated marketplace of ideas an untenable paradigm for those individuals who seek full and equal personhood for all. The real problem

difference between their proposed system and the one it would replace. Under the system proposed by critical race theorists, the new reigning paradigm would be enforceable through an entire set of sanctions not currently available to enforce ideological conformity: fines, civil damages and even jail sentences.[33] And of course, there is always the possibility that the critical race theorists' attacks on the First Amendment will be only partly successful. It does not take much imagination to conceive of the possibility that very different ideological forces could turn the critical race theorists' system to very different ends than Lawrence, Delgado and Matsuda would like. After the well-meaning critical race theorists have eliminated most or all constitutional restrictions on government regulation of speech, the predominant forces in the government could easily choose to use their new powers in ways that reinforce the very "reigning paradigm" that the critical race theorists now find so oppressive. I will return to these and other problems associated with the critical race theory approach to social constructionism after briefly reviewing two other similar postmodern censorship theories.

B. *Constructing Evil: Sexism*

The feminist version of the social construction argument contains most of the same elements that are at the heart of critical race theory. Like critical race theorists, feminists such as Catharine MacKinnon have argued for many years that pornography (defined to include expressive materials that are sexually demeaning to women, but not necessarily legally obscene[34]) has "constructed" women in many negative ways, making it impossible for women to realize their full potential either as citizens or as happy and productive individuals. For MacKinnon, "pornography institutionalizes the sexuality of male supremacy, which fuses the erotization [sic] of

---

> is that the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat).... [R]acism makes the words and ideas of blacks and other despised minorities less saleable, regardless of their intrinsic value.

Lawrence, *supra* note 12, at 468.

[33] On the application of criminal sanctions to racist speech, see Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992) (criticizing a Supreme Court decision striking down a statute imposing criminal sanctions for racial hate speech).

[34] For MacKinnon's view on the differences between "obscenity" and "pornography," see CATHARINE A. MACKINNON, *Not a Moral Issue, in* FEMINISM UNMODIFIED 146, 150-54 (1987); *see also id.* at 262 n.1 (defining "pornography").

dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is."[35]

Pornography has been a central focus of MacKinnon's work because she seems to believe that pornography is the single most important defining characteristic of the modern female personality. She asserts flatly that "pornography constructs the social reality of gender," such that all women are "defined in pornographic terms."[36] Like critical race theorists, MacKinnon argues that society has managed to construct such an efficient and effective discriminatory structure that few people recognize the true nature of that system: "To the extent pornography succeeds in constructing social reality, it becomes invisible as harm."[37]

As with the critical race critique, MacKinnon's theory asserts that the products protected by the present system of free expression harm both the dominant speakers (men) and the victims who are targets of the discriminatory speech (women). MacKinnon sketches the harm done to men only briefly and this harm usually takes obvious forms, such as men's inability to relate to women.[38] In contrast, MacKinnon's description of the harms imposed by the present system on women is very detailed, graphic and (at least to an outsider's eye) oddly unflattering to the group of victims to which she offers her support. Throughout MacKinnon's writings, women are described as weak and as victimized by their own sexuality (that is, the sexuality constructed for them by male-dominated society). "Sexualized objectification is what defines women as sexual and as women under male supremacy."[39] According to MacKinnon, female sexual desire "is socially constructed as that by which we come to want our own self-annihilation."[40] She views other traits possessed by women in a similar light. For example, MacKinnon criticizes Carol Gilligan's celebration of women's care-giving tendencies,[41] and contends that

---

[35] *Id.* at 148 (endnote omitted).

[36] CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED, *supra* note 34, at 163, 166.

[37] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 204 (1989).

[38] *See, e.g.*, MACKINNON, *supra* note 36, at 189-90 (describing how one man's experiences with pornography made it difficult for him to connect with women).

[39] CATHARINE A. MACKINNON, *Desire and Power*, *in* FEMINISM UNMODIFIED, *supra* note 34, at 46, 50.

[40] *Id.* at 54.

[41] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). Gilligan posits a three-stage

"[f]or women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness."[42]

The feminist version of social constructionism is also like the critical race version in that the critique of reality—and its prescription for future action—goes beyond simply regulating the more extreme antisocial expression that is the immediate subject of most feminist and critical race writings. The image that MacKinnon uses repeatedly in her work is that of a film containing depictions of women being raped, beaten and killed,[43] and the overt intent of MacKinnon's writings is to eliminate what she sees as the widespread availability of this material. Yet, as one skeptic of the MacKinnon approach noted recently, this narrow focus detracts from the larger critique of society that is "unmodified" feminism's main point:

> A common misreading of the feminist critique implicates only manifestly coercive or violent pornography in the maintenance of patriarchal subordination. In fact, the feminist critique is a good deal more radical; it concerns the social construction of sexuality, not violence, and a narrow focus on violent pornography trivializes the feminists' point.[44]

Indeed, MacKinnon's critique is probably even more radical than this quote suggests, because to the extent that sexuality infuses every facet of a person's personality (as MacKinnon clearly believes), her perspective requires a radical transformation of human personality in its most basic respects.

There is little in the writings of MacKinnon or other feminists who take a similar position to indicate how such a radical transformation of personality is supposed to occur. But it is very clear that

---

path of moral development in women. In the third and most advanced stage, "[c]are becomes the self-chosen principle . . . that remains psychological in its concern with relationships and response but becomes universal in its condemnation of exploitation and hurt." *Id.* at 74.

[42] CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED, *supra* note 34, at 32, 39.

[43] *See, e.g.*, MACKINNON, *supra* note 36, at 171. MacKinnon writes:

> In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively.

Id.

[44] Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 664 n.19 (1995).

the first step in this radical transformation is the widespread use of coercive government power to eradicate speech that runs counter to the MacKinnonite perspective on issues of gender and sexuality. The First Amendment is not a barrier to the pervasive government control over expression that carries improper messages because, according to MacKinnon, "pornography is more actlike than thoughtlike."[45] MacKinnon argues that speech is indistinguishable from the sorts of harmful physical actions—battery, rape, murder—that the government has long controlled through the use of its various coercive tools. "In pornography, pictures and words are sex. At the same time, in the world pornography creates, sex is pictures and words. As sex becomes speech, speech becomes sex."[46] Note that her argument is not that the speech causes the act (although she believes that, too[47]); her argument is that the speech *is* the act—and is therefore subject to regulation as such:

> To express eroticism is to engage in eroticism, meaning to perform a sex act. To say it is to do it, and to do it is to say it. It is also to do the harm of it and to exacerbate harms surrounding it. In this context, unrecognized by law, it is to practice sex inequality as well as to express it.[48]

MacKinnon's argument, like that of critical race theorists, proceeds logically to a conclusion that is fundamentally at odds with the modern Western view of the proper relationship between a government and its citizens. The notion that "bad" speech "constructs" people in negative ways, and that this negative social construction is properly the concern of the government, leads necessarily to the corollary that the government is properly concerned with "constructing" a society of "good" people. Under this theory, one of the government's main tasks (assuming the government is controlled by a working majority of "good" officials who are themselves correctly constructed) is to create a citizenry in its own image. This is directly contrary to the relationship between citizens and the government that serves as the basis for modern democratic theory.

---

[45] MACKINNON, *supra* note 37, at 204.

[46] CATHARINE A. MACKINNON, ONLY WORDS 26 (1993).

[47] *See* MACKINNON, *supra* note 36, at 184 ("Specific pornography does directly cause some assaults. Some rapes *are* performed by men with paperback books in their pockets." (endnote omitted)).

[48] MACKINNON, *supra* note 46, at 33.

MacKinnon's equation of speech and action is the key to understanding how deeply her approach would alter the current law and the common understandings about democratic citizenship on which that law is based. At the simplest level, by equating speech and action, MacKinnon would have the government hold the speaker (or film director or writer) of antisocial ideas accountable for those ideas as if the speaker had acted on those ideas; a verbal depiction of a rape fantasy presumably would be punishable as rape. But the implications of MacKinnon's theory extend far beyond the pornography that is her immediate subject. The analysis also would hold speakers accountable for the negative consequences of a political or social perspective embodied in abstract or theoretical speech, as well as pornographic speech. MacKinnon comes close to saying this explicitly:

> Together with all its material supports, authoritatively *saying* someone is inferior is largely how structures of status and differential treatment are demarcated and actualized. Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized. Social supremacy is made, inside and between people, through making meanings. To unmake it, these meanings and their technologies have to be unmade.[49]

Elsewhere, MacKinnon specifically suggests suppression (at least in an educational context) of "academic books purporting to document women's biological inferiority to men, or arguing that slavery of Africans should return, or that Fourteenth Amendment equality should be repealed, or that reports of rape are routinely fabricated."[50]

The suggestion that someone could be prohibited—especially in a classroom setting—from advocating the repeal of a constitutional amendment tells us how far MacKinnon diverges from the world of democratic constitutionalism in which we currently live. Given her position on social constructionism, however, this extreme stance is inevitable. Simply regulating the tawdry and quasi-underground market in pornography would not be sufficient to achieve MacKinnon's goal of eliminating all manifestations of social domination and the subordination of women. This larger goal can

---

[49] *Id.* at 31 (footnote omitted).
[50] *Id.* at 107.

only be achieved if the government suppresses *all* expressive works that are viewed (in the eyes of a government official representing the views of those controlling the government) as contradicting the goals of equality and antisubordination. To permit such contrarian works would be to risk undermining the government's social construction of its citizens through the instilling of positive, egalitarian values.

This point serves as a natural bridge to the third example of postmodern censorship, civic republicanism, which is concerned primarily with the government's role in creating citizens that exhibit the proper characteristics for participating in a just society, in part through the suppression of "bad" speech.

C. *Constructing Virtue*

Like feminist and critical race theorists, civic republicans such as Cass Sunstein express grave doubts about the free-wheeling system of free speech that has developed during the last seventy years.[51] The source of the civic republicans' skepticism about free speech is a broader version of the critical race theorists' concerns about racism and Catharine MacKinnon's concern about sexism. In particular, civic republicans argue that a republican form of government (such as the one established under the United States Constitution) should do more than mediate between the selfish desires of different interest groups. As opposed to a pluralist notion of democratic government, based on the reconciliation of competing interests, "republican approaches posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process."[52] This "common good" will be determined after a deliberative process

---

[51] Of course, there are many different strains of civic republicanism, and just as many different proponents of the theory. I will focus here on Cass Sunstein because he is probably the most prominent advocate of civic republicanism, he has written extensively on the issue of free speech, and his reservations about the system of free speech are consistent with other prominent civic republican advocates such as Frank Michelman. *See* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 319 (1989) (arguing that antipornography laws might be constitutional). Although my criticisms apply directly only to Sunstein's version of civic republicanism, I believe that Sunstein's version is probably the most logical and internally consistent version of civic republicanism. Therefore, as I have argued elsewhere, any honest application of the theory will exhibit the same types of serious and probably insurmountable flaws. *See* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 897-98 (1993).

[52] Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) (footnote omitted).

during which citizens will exercise "political empathy"[53] and "'think from the [position] of everybody'"[54] in considering society's problems and in choosing a collective response. In contrast to pluralist versions of democratic theory, in which groups respect political compromise by agreeing to disagree about fundamental social values, civic republicans posit a political system that "is designed to produce substantively correct outcomes."[55]

I have explained elsewhere my disagreement with the civic republicans' basic premises about republican government,[56] and will not repeat those general criticisms here. My present concern is the civic republican view of the government limiting expression to foster something the republicans call "civic virtue." Civic virtue is an odd concept in civic republican theory because, although Sunstein calls it the "animating principle" of civic republicanism,[57] civic republican theorists have never really defined what the term means. It seems clear, however, that civic republicans believe that "civic virtue" will be one of the main "substantively correct outcomes" of republican political deliberation.[58]

The term is probably synonymous with the "common good" that Sunstein believes will be "found at the conclusion of a well-functioning deliberative process."[59] Thus, under a properly constructed (i.e., civic republican) political structure, the government will be entitled to assume that, after an appropriate amount of deliberation, the decisions it reaches about fundamental values are substantively correct. And, conversely, those running the government are entitled to conclude that the citizens who obstinately cling to disfavored values are wrong. As Sunstein says, "[the republican] conception reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that 'practical reason' can be used to settle social issues."[60]

---

[53] *Id.* at 1555 (footnote omitted).

[54] *Id.* at 1569 (quoting Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229, 244 (1989)).

[55] *Id.* at 1554.

[56] *See* Gey, *supra* note 51, at 897-98 (summarizing the weaknesses of civic republicanism).

[57] Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

[58] Sunstein, *supra* note 52, at 1554.

[59] *Id.*

[60] Sunstein, *supra* note 57, at 31-32 (footnote omitted).

Problems arise when this "universalist"[61] view of the political process is combined with an equally universalist view of the role of the individual in that political process. Like the two postmodern censorship theories considered above, civic republicans consider the individual to be little more than a messy conglomeration of the individual's social influences. "Under [a republican] regime, purely private preferences are understood to be shaped by circumstances; they are social constructs."[62] Among the social influences on private preferences, Sunstein lists "the context in which the preference is expressed, the existing legal rules, past consumption choices, and culture in general."[63] Since social influences change, individual preferences likewise evolve as they adapt to new social conditions. And, more ominously, individual preferences are especially susceptible to positive government intervention.

The government is obviously one of the most powerful, and therefore most effective, social influences on the formation of individual preferences. Sunstein states very benignly the role played by the civic republican state in the social construction of individual values, filtering his version of social constructionism through the republican notion of direct citizen participation in government policymaking. In this conception, government becomes the "deliberative process in which a person chooses her own ends and does not merely attempt to satisfy whatever ends she 'has.'"[64] This is an admirably participatory view of the governmental process. But Sunstein is somewhat vague about what will happen in that process to those who remain unconverted to the ends chosen by the majority. Sunstein never conclusively deals with the problems that will occur whenever his system encounters steadfast dissent over fundamental values. His preferred solution to such problems is suggested by his comment that "a democratic government should sometimes take private preferences as an object of regulation and control."[65] In other words, the government should seek to cure the dissenters of their misguided attitudes.

For all his talk about popular sovereignty and self-governance, Sunstein must (and in fact, does) endorse governmental restrictions

---

[61] For a discussion of universalism, see Sunstein, *supra* note 52, at 1554-55.

[62] Cass R. Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129, 1133 (1986).

[63] Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 5 (1991).

[64] Sunstein, *supra* note 62, at 1132-33.

[65] Sunstein, *supra* note 63, at 13.

on an individual citizen's ability to engage in certain kinds of expression, so that the government may mold citizens' personalities and attitudes in positive ways. This not only involves government prohibition of "anti-social" speech, such as pornography or hate speech, but also government efforts to prevent citizens from maintaining a steady diet of unenlightening expression, such as popular but low-quality light entertainment programming on television.[66] And this is probably only the beginning. The individual personality is a many splendored thing, and it is doubtful that a civic republican government could stop itself from refurbishing its citizens' personalities until the job is complete. It is difficult to see a logical limitation on the open-ended proposition that "a democratic government should sometimes take private preferences as an object of regulation and control."[67]

By increasing the government's power in this way, Sunstein also simultaneously accedes to increasing the power of whatever sector of society musters the political resources to gain control over the government. No matter how empathetic citizens endeavor to behave in a large, diverse democracy, there will always be substantial, irreconcilable differences between some groups and individuals, even "at the conclusion of a well-functioning deliberative process."[68] Unless Sunstein intends to propose a system that operates only by consensus—a completely hypothetical system—then he must recognize that some people will win and some people will lose in every democratic political system, including those labelled "civic republican." Unfortunately, in a civic republican system, the principles dictate that if the winners think little enough of the losers' perspective on some important matter (race, sex, violence on television), then the government may force the winners' views upon the losers without fear of constitutional limitation.

Sunstein's explanation for giving the government this kind of power over individual expression in a civic republican system is nothing more than a simple extension of the social constructionism argument. According to the social constructionism argument,

---

[66] On the latter point, see Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 160 (1994) (arguing that the First Amendment should be interpreted to permit greatly increased government supervision of private broadcasting, including mandatory content review by supposedly nonpartisan experts of children's programming, and specific programming mandates for increased public affairs programming).

[67] Sunstein, *supra* note 63, at 13.

[68] *See* Sunstein, *supra* note 52, at 1554 (footnote omitted).

individuals are "constructed" by their social influences. Some of those social influences are produced by market forces that are themselves driven by the self-interest of other market participants, which do not necessarily coincide with the public interest. This leads individuals to do or want things that are not good for them and are harmful to the commonweal. Thus, in Sunstein's formulation of the argument, the overriding influence of social forces creates a schism between an individual's "actual interests" and that individual's "interests as subjectively perceived [by that individual]."[69] According to Sunstein, the market distortions that produce an individual's subjectively (but incorrectly) perceived interests "will support considerable legislative and judicial intrusion into private preference structures" to correct such distortions.[70] In other words, the government should be given the authority both to sort out the "actual" from the merely "subjectively perceived" individual preferences and to correct for "bad" social conditioning by creating an elaborate system of social controls and value instruction intended to produce individuals imbued with a range of government-dictated "actual" preferences.

Needless to say, implementation of this theory would radically change the relationship between the individual and government that has long been the basis for this society's system of judicially protected civil liberties. Despite its radical consequences, Sunstein's comprehensive theory of government merely takes the social constructionist premise of all postmodern censorship schemes and carries that premise to its logical conclusion. If individuals are nothing more than uncognizant mirror-images of their collective social influences, then there is no real barrier to using another form of "good" collective power to counteract those "bad" social influences. One product of collective influence replaces another, with no net loss of individual freedom. Social constructionist arguments assume that there is no such thing as a constitutionally relevant individual, and that individual freedom of thought is a cruel delusion. Therefore, constitutional rights (such as the right of free speech) that depend on mythical notions of individuality are empirically flawed and may be dispensed with in favor of some alternative system of collective value determination filtered through and enforced by the government. Nothing is lost, because the thing that the old system sought

---

[69] Sunstein, *supra* note 62, at 1171.

[70] *Id.* at 1172.

to protect (the free-thinking individual) never existed in the first place. This is the essence of what Richard Delgado lauds as the "new paradigm" for free speech.[71]

Of course, this "new paradigm" responds to the old paradigm in which individuals *do* really exist, freedom from coercion (both governmental and social) is possible, and those who control the government do not have the authority to recast the views of dissident citizens to satisfy the leaders' notions of good and evil. Oddly enough, the "new paradigm" is not so new itself. It is essentially the same argument that governments have always used when confronted with unruly masses that insist on rejecting the government's superior understanding of what is good for them. As the next subsection indicates, the flaws in the old version of the "new paradigm" are the same as those that plague its postmodern revivalists.

D. *The Intellectual Precursors of Social Constructionism*

There is nothing new about the notion that individuals are "constructed" by their social circumstances and that it matters what individuals read, hear or watch on television and movie screens. Governments have always justified their efforts to censor dissenting speech on the ground that they must do so to prevent bad ideas from gaining adherents among society's easily duped masses. When Justice Sanford wrote in *Gitlow v. New York* that a Socialist Party faction's "Left Wing Manifesto" "involve[s] danger to the public peace and to the security of the State,"[72] Sanford was referring to the possibility that Gitlow's manifesto would convince other individuals to participate in revolutionary action, possibly including violence. When Sanford wrote that the government may criminalize revolutionary speech in order to "suppress the threatened danger in its incipiency,"[73] he was referring to the possibility that a steady diet of radical ideas would "construct" (to use the modern term) a legion of new revolutionaries by changing the thought patterns of previously apathetic and docile citizens. The early Court's supporters noted pointedly that radical speech was likely to teach the unhappy lower classes unhealthy political lessons, and thus *all* examples of such speech had to be eradicated by the government to prevent precisely

---

[71] *See* Delgado, *supra* note 2, at 170.
[72] Gitlow v. New York, 268 U.S. 652, 669 (1925).
[73] *Id.*

the sort of widespread and harmful social conditioning that postmodern censors now vociferously lament.[74]

The focus on negative social conditioning has also been prevalent in the immoral speech cases since the first reported opinions on the subject, and in fact the Supreme Court still uses its own variation on the social constructionism argument as one of the primary justifications for modern obscenity law. The problem of immoral social conditioning was a key to the House of Lords' decision in *Regina v. Hicklin*,[75] the notorious nineteenth-century British case that established the standard that would govern both British and American obscenity law for almost one hundred years. The standard for obscenity set by that case was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[76]

The concern reflected in the *Hicklin* standard is precisely the same as the elitist modern notion that many people cannot distinguish between their "actual interests" and their "interests as subjectively perceived."[77] The concern is that the unreflective masses are always prone to giving in to their baser instincts,[78] and therefore are always susceptible to being "depraved and corrupted" if the beneficent government does not step in and save them from expressive temptation. This notion not only forms the basis of the postmodern censorship theories discussed in this Article, but also guides the Court in its pronouncements permitting government control of sexual speech. Although the Court has modified the *Hicklin* standard several times since it first took up the subject of sexually explicit speech in 1957,[79] the Court continues to justify government regula-

---

[74] *See* John H. Wigmore, Abrams v. U.S.: *Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539, 550 (1920) ("If these five men could, without the law's restraint, urge munition workers to a general strike and armed violence, then others could lawfully do so; and a thousand disaffected undesirables, aliens and natives alike, were ready and waiting to do so.").

[75] 3 L.R.-Q.B. 360 (1868).

[76] *Id.* at 371.

[77] *See supra* text accompanying note 69.

[78] For Sunstein's explanation of the human tendency to favor pleasing, short-term "first-order preferences" over difficult, long-term "second-order preferences," see Sunstein, *supra* note 62, at 1140-41.

[79] *See* Roth v. United States, 354 U.S. 476 (1957). *Roth* gave us the "prurient interest" test, which permits government to prohibit only sexual speech that appeals to "prurient interests." *Id.* at 487. The Court has never systematically attempted to clarify the meaning of "prurience," relying instead on vague suggestions that "prurience" must appeal only to "shameful or morbid interests in sex," and not to

tion of such speech by referring to the need to control immoral expression in order to prevent the widespread debasement of public morals.

In one of the 1973 decisions establishing the modern test for obscenity, Chief Justice Warren Burger noted, on behalf of the Court, that

> [t]he sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.[80]

Catharine MacKinnon and Chief Justice Burger essentially agree that the "crass commercial exploitation of sex" constructs gender relations in undesirable ways. They may disagree on what desirable gender relations would look like and, unlike the Court, MacKinnon would undoubtedly enforce the logic of her convictions consistently and with rigorous legal sanctions if she had the chance. In the end, however, there is little difference between MacKinnon and Burger on the theoretical merits of social constructionism.

For all the elaborate theoretical baggage that the postmodern censors use to support the claims of social constructionism, the theory amounts to nothing more than the argument that speech is sometimes so compelling that it convinces a listener (or reader or viewer) to adopt an entirely new perspective on the world. Holmes made the same point more eloquently: "Every idea is an incitement. It offers itself for belief and if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at birth."[81] It is difficult to see what the postmodern censors have added to this simple truth by arguing that individuals are "socially constructed," except perhaps to emphasize that ideas are sometimes offered in insidious and subtle ways, and are sometimes adopted by individuals who do not carefully and rationally consider the merits of harmful but superficially attractive beliefs. This is the same basic attitude that the government and its supporters on the

---

"normal" interest in sex. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504-05 (1985). Whatever the term means, it is undoubtedly intended to ensure that protected speech appeals only to higher-order, intellectual "second-order preferences" as opposed to baser, visceral "first-order preferences." *See supra* text accompanying note 78.

[80] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

[81] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

Court in the 1920s held about immigrants and members of the working class, who were perceived by the government to be especially susceptible to the siren song of radical socialism.[82] Fear of society's moral gullibility is also the persistent theme of the Court's continuing willingness to permit suppression of sexual speech that "debases and distorts" human personality. The new explanation for censorship, therefore, adds nothing to the old.

E. *The Flaws of Social Constructionism*

Although they locate themselves on different ends of the political spectrum, postmodern and conservative censors have similar responses to the effects that harmful speech might have on susceptible citizens in an unsettled, uncertain and sometimes dangerous world. In a nutshell, that response is fear—that is, fear of radicalism (among the conservatives), or fear of rampant racism, sexism and short-sighted political selfishness (among the postmodernists). In both cases, the claim is that the feared evil threatens to destroy the positive values of democracy that both postmodern and conservative censors claim to represent. This fear leads each group to propose the same solution: Suppress the expression of ideas that are the source of the fear. Hence, censorship.

The advocates of the conservative and postmodernist censorship proposals build on the almost universal acknowledgement that even a democratic government occasionally will have to suppress some speech to preserve public order, although the censorship proponents sometimes seek to portray this basic pragmatic reality as if it were a novel contribution to free speech theory. Postmodernists, in particular, are fond of ridiculing the supposedly dominant "absolutist" position on speech,[83] despite the fact that the absolutist

---

[82] In *Frohwerk v. United States*, 249 U.S. 204 (1919), which upheld the conviction of a German-language newspaper for the publication of antiwar articles, Holmes likened the newspaper's readers to dry tinder: "[O]n the record . . . it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame . . . ." *Id.* at 209. Justice Sanford repeated this image in *Gitlow*:

> A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

Gitlow, 268 U.S. at 669.

[83] *See, e.g.*, CATHERINE A. MACKINNON, *The Sexual Politics of the First Amendment, in*

position has never held sway over more than perhaps one Justice in the entire history of the Supreme Court.[84] The real difference

---

FEMINISM UNMODIFIED, *supra* note 34, at 206, 208 ("Absolutism has developed through obscenity litigation, I think, because pornography's protection fits perfectly with the power relations embedded in First Amendment structure and jurisprudence from the start."). MacKinnon even argues that the absolutist position has prospered in part because of the influence that *Playboy* magazine has had on its readers:

> I must also say that the First Amendment has become a sexual fetish through years of absolutist writing in the melodrama mode in *Playboy* in particular. . . . What is conveyed is not only that using women is as legitimate as thinking about the Constitution, but also that if you don't support these views about the Constitution, you won't be able to use these women.

Id. at 209; *see also* Matsuda, *supra* note 29, at 2356 ("[E]ven strong civil libertarians are likely to admit that the absolutist view is unworkable."); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 260 (1992) ("The basic commitments of the absolutist view are now clichés, even dogma. Despite that view's novelty and the lack of direct historical support on its behalf, it has won a dramatic number of victories in the Supreme Court.").

[84] The exception, of course, is Justice Black, who argued that the First Amendment prohibited regulation of free expression "without deviation, without exception, without any ifs, buts, or whereases . . . ." Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 559 (1962). The qualifying word "perhaps" in the text accompanying this note refers to the fact that, for all his expressed absolutist inclinations on matters of expression, Justice Black had a decidedly unfriendly attitude toward extending constitutional protection to clearly communicative symbolic speech. *See* Street v. New York, 394 U.S. 576, 609-10 (1969) (Black, J., dissenting) (refusing to extend constitutionally protected free speech to flag burning). Black's free speech "absolutism" is therefore far removed from the "everything is speech" caricature that appears in the work of the postmodernists.

The problems with the grandiose claims made by the postmodernists may be rooted in their flexible use of the First Amendment nomenclature. The standard meaning of the word "absolutist" suggests someone who asserts a form of First Amendment protection that is complete and unconditional. This meaning is exemplified by Justice Black's famous dictum that the First Amendment's "no law" language means literally *no* law. *See* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law . . . abridging' to mean *no law abridging.*"). Some of the postmodernists use the word "absolutist," however, simply as a label for theorists who would permit some government regulation of speech, but (in the minds of the postmodernists) not enough. Thus, Cass Sunstein presents as examples of the "absolutist view" cases involving commercial speech, obscenity, libel, publication of the names of rape victims, advocacy of crime, campaign financing, corporate speech, hate speech and flag burning. *See* Sunstein, *supra* note 83, at 260-61 & n.19. Interestingly, not a single case that Sunstein cites as an example of "absolutism" even suggests, much less holds, that any of these categories of speech is protected completely, unconditionally or without exception. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) ("Our holding today is limited. We do not hold that truthful publication [of names of rape victims] is automatically constitutionally protected . . . ."); Texas v. Johnson, 491 U.S. 397, 408-10 (1989) (recognizing that flag burning is not protected speech if actual breach of the peace results); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (indicating that corporate speech is not protected from government interference by the First Amendment when a "compelling state interest"

between the postmodernists and their antagonists is not the difference between short-sighted First Amendment "absolutists" and benign representatives of a diverse population; the real difference is between theorists who trust the government to channel thought through regulation of expression, and those who do not. Although every First Amendment theorist of note would permit some regulation of speech, the more protective versions of First Amendment theory—an amalgam of which forms the heart of the Supreme Court's First Amendment jurisprudence regarding political speech—include a central presumption that runs in favor of speech and against suppression. This presumption means that governmental suppression of speech should be permitted only if the government's fears of imminent danger are fully justified, the speech is a direct and immediate cause of the danger, the suppression of speech is a logical response to these well-grounded fears, and the costs of suppression do not outweigh the benefits of social peace and ideological tranquility.

The primary lesson of the Holmes and Brandeis opinions in the early speech cases[85]—opinions that have now superseded the majority's approach in those cases[86]—is that the old antiradical

---

justifies such interference). Describing these decisions as "absolutist" does not convey an accurate impression of the law produced by these decisions, but use of the term does serve the rhetorical purpose of conveying the postmodernist view that the extensive protection offered to speech in these cases represents an unhealthily extremist position, which should be brought back in line through a wholesale reconsideration of the government's power over speech.

[85] *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (arguing that only production of a "clear and imminent danger" of some substantive evil allows a state to restrict speech and assembly, but that the organization and assembly of the Communist Party, even to "teach criminal syndicalism," do not meet this standard); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (noting that because "[e]very idea is an incitement," publication would be a crime only if it constitutes "an attempt to induce an uprising against government at once and not at some indefinite time in the future"); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.").

[86] The Court announced as early as 1951 that it was adopting the Holmes/Brandeis approach in First Amendment cases involving political speech, *see* Dennis v. United States, 341 U.S. 494, 507-08 (1951), although it would take the Court another 18 years fully to incorporate the Holmes/Brandeis standard into constitutional doctrine. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (holding that Supreme Court decisions beginning with *Dennis* have "fashioned the principle that the constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such

censorship scheme could not pass this test. For many years, the Court has adopted the Holmes/Brandeis view that in the early free speech cases the government's fears of speech were overwrought, the suppression of speech did not address any real political danger, and a great deal of legitimate dissent was lost in exchange for no particular social gain. The postmodern censors would now have us renounce these lessons and return to something like the standard that Justice Sanford proposed seventy years ago. The only difference is that the targets of the suppression would now be different. Unfortunately, the new censorship schemes cannot pass the test any more easily than the old scheme, in part because of serious defects in the social constructionist argument that forms the foundation of the new censorship schemes. Specifically, the social constructionist premises of the postmodern censorship theories are flawed in at least four ways: empirically, epistemologically, politically and theoretically.

1. The Empirical Flaw

The empirical problem with the social constructionist argument has several manifestations. The first manifestation is the frequent attempt by postmodern censors to equate speech with some other, nonexpressive phenomenon such as discrimination. This claim is made most clearly in the feminist literature, as in Catharine MacKinnon's unsuccessful attempt (in conjunction with Andrea Dworkin) to write a statute that would withstand constitutional scrutiny by defining pornography as discrimination.[87] Indeed, all of MacKinnon's writings on the subject of pornography seem directed primarily toward rebutting the common claim of First Amendment advocates that pornography involves the expression of ideas and is therefore conceptually distinct from illegal action such as discrimination.[88] MacKinnon argues that the communication of pornographic images is itself a form of discriminatory action, and therefore should be treated by the government as essentially indistin-

---

action").

[87] *See* MACKINNON, *supra* note 34, at 262 n.1 (defining pornography as "the graphic sexually explicit subordination of women"). The Indianapolis version of this statute was held unconstitutional in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). For one example of the critical race theory version of the speech-as-discrimination argument, see Lawrence, *supra* note 12, at 440-44. Lawrence argues for an understanding of the "inseparability of racist speech and discriminatory conduct." *Id.* at 442.

[88] Her latest book is devoted almost entirely to this subject. *See* MacKinnon, *supra* note 46.

guishable from many other forms of discrimination that the government routinely regulates.

MacKinnon's analysis of pornography is, to say the least, controversial. MacKinnon's attempt to describe pornography as something other than the communication of ideas is a response to the probably insuperable difficulties inherent in the narrower claim that pornography directly causes particular illegal actions such as rape.[89] MacKinnon attempts to avoid these causation difficulties by making the much broader claim that pornography instills in men and women certain ideas about gender that create a discriminatory society, which in turn subjugates women in almost every aspect of their lives. According to this argument, since the ideas expressed in pornography constitute discrimination, there is no need to link these ideas causally to any other phenomenon.

Unfortunately, this approach does not cure the causation problem; it makes the problem worse. Even if we leave to one side the disputable value judgments inherent in MacKinnon's theory that gender is presently constructed in undesirable ways by the easy availability of sexually explicit speech, her theory requires a number of empirical conclusions that can never be proved. These unknowns include conclusions about the precise meanings of a very large and diverse body of speech, the psychological effects such speech has had on particular individuals (which, of course, must be isolated from the effects created by other aspects of society and the idiosyncrasies of individual personalities), the social consequences of these psychological effects, and the multiple ramifications of a policy authorizing governmental suppression of speech. The controversy surrounding MacKinnon's account of reality does not necessarily demonstrate that her account of reality is false; but the controversy does demonstrate that her account of reality is not a matter of empirical fact. MacKinnon's claims, like the claims of her opponents, are political

---

[89] For descriptions of these problems, see Augustine Brannigan, *Obscenity and Social Harm: A Contested Terrain*, 14 INT'L J.L. & PSYCHIATRY 1-10, 10 (1991) ("[I]t would seem more plausible to consider the pornographic as a scapegoat which exemplifies all the sexist tendencies of our culture than to theorize its role as a determinate cause of sexist attitudes and sexual aggression in our societies."); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1599-1606 (1988) (noting that "no one has been able to demonstrate that identifiable, physical harms result directly from pornography"); Daniel Linz et al., *The Attorney General's Commission on Pornography: The Gaps Between "Findings" and Facts*, 1987 AM. B. FOUND. RES. J. 713, 713-28, 723 (describing the absence of evidence supporting the "view that exposure to sexually violent material leads to aggressive or assaultive behavior *outside* the confines of the laboratory").

opinions that are imbued with value judgments, which people of good faith may accept or deny. The point is: MacKinnon may be wrong about what pornography does, and she may also be wrong about the consequences of giving government the authority to dictate how sexuality will be addressed in speech by citizens.

This distinction is important because MacKinnon and the other postmodern censors treat the current debate over free speech as a debate between faith and fact; that is, the free speech advocates' blind faith in the value of expression, versus the censors' empirically verifiable proof of particular factual evils created by free speech. The case for suppression of speech becomes much weaker if the postmodernist claims are seen as being at least as speculative as the claims of the most avid and absolutist free speech proponent. The postmodernists make essentially unprovable claims that the cited harms (such as the denial of equality due to discriminatory social conditioning) are directly attributable to free speech, that this social situation would improve markedly if the government were given significantly greater control over how people thought about themselves and the world, and even that postmodernist sympathizers would be able to control the government once they gave it this new power over speech (this is the political flaw discussed below).[90] In this light, postmodernist proposals to give the government expansive new power over speech themselves represent willful acts of blind faith.

Other manifestations of the empirical problem with postmodernism's theory of social constructionism also involve the difficulty of accurately assessing the meaning, import and consequences of speech. All postmodern censorship is premised on the need to suppress "bad" speech to further "good" social values (such as equality) through social conditioning. But any attribution of value and consequences to particular speech requires empirical judgments that are problematic in ways that are similar to the problems arising from Catharine MacKinnon's questionable claims about sexual expression. This problem dooms Cass Sunstein's attempt to divide human preferences into upper-level "second-order preferences," which the state may seek to foster through the dissemination or encouragement of certain kinds of speech, and lower-order "first-order preferences," which the government may discourage through

---

[90] *See infra* notes 101-05 and accompanying text.

the prohibition of other kinds of speech.[91] The first-order/second-order preference dichotomy cannot withstand analysis because regardless of the mechanism used to delineate these categories, any conclusion will be tainted by the values brought to the table by the regulators. There is simply no empirically verifiable way to determine whether some preferences are "worse" than others, except to insert a series of self-serving judgments about "good" and "bad," which will determine the outcome of the analysis before it even takes place.[92]

2. The Epistemological Flaw

The empirical flaw in postmodernist social constructionism is related to the theory's epistemological flaw. The epistemological flaw arises when the claims of social constructionism are turned on the postmodern censors themselves. The epistemological flaw is this: If the postmodern censors are correct in their claim that everyone in society is "constructed" by society in ways that distort their ability to understand and respond wisely to the true nature of the reality around them, how can we be sure that the solutions offered by the postmodernists are not themselves so badly distorted that their preferred solution will do more harm than good, if they do any good at all? How do we even know that the postmodern censors' characterization of the problem is correct? How do we know, for example, that the critical race theory and feminist proposals for censorship are

---

[91] *See* Sunstein, *supra* note 62, at 1140-41.

[92] At one point, Mari Matsuda writes:

> Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.

Matsuda, *supra* note 29, at 2357. But from a slightly different perspective, government control over expression is also a *sui generis* category "so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond," *id.*, that it is properly treated as unacceptable in a democratic state. One of these propositions leads to government suppression of some speech involving race; the other rejects such a solution. But neither of these propositions can be judged "true" or "false" without the application of value choices about the meaning of democratic government that are outside the realm of empirical proof. The postmodern censors are entitled to argue in favor of their version of democracy, but they cannot win the argument by demonstrating that some category of speech is, as a matter of empirical analysis, not worthy of being treated as speech.

not themselves based on misjudgments about the importance or effects of racist and sexist speech?

For that matter, is it not possible that the postmodern censorship theories distort reality by emphasizing the dangers of speech too heavily? As Cass Sunstein has pointed out: "The reduction of cognitive dissonance is a powerful motivating force: people attempt to bring their beliefs and perceptions in line with existing practice."[93] He has also noted: "Preferences may be distorted . . . by interest-induced beliefs on the part of the beneficiaries of existing practice."[94] Regardless of why the postmodern censorship theories were first formulated, once a theorist adopts the theory as his or her own, and expends the time and effort advancing that theory, the theorist inevitably begins to perceive reality through the prism of that theory.[95] To borrow Sunstein's phrasing, the postmodernists' preference for greater government control of speech may be distorted by the interest-induced beliefs of theorists who have a great deal of time and energy invested in a particular set of policy proposals. These proposals for government control of speech are, therefore, by the terms of the proposals themselves, deeply suspect.

Another variation on this theme is the possibility that the theorists are too close to the problems they describe to make accurate judgments about the costs and benefits of their proposals. Charles Lawrence chides civil libertarians for downplaying the importance of racist expression, based in part on his own encounters with racist speech.[96] But is it not possible—again, based on Lawrence's own use of the social constructionist argument—that such encounters have had a distorting effect on Lawrence's preference for broad government regulation of racist speech? As a minority, Lawrence has had to endure countless examples of gratuitous racism. But he has extrapolated from his reaction to these specific instances of racism some very broad theories of government regulation of speech and ideas, which will have ramifications far beyond the

---

[93] Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 759 (1991).

[94] Sunstein, *supra* note 52, at 1544.

[95] Again, this is a point made by the postmodernists themselves: "Narrative theory shows that we interpret new stories in terms of the old ones we have internalized and now use to judge reality. When new stories deviate too drastically from those that form our current understanding, we denounce them as false and dangerous." Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 882 (1994).

[96] *See, e.g.*, Lawrence, *supra* note 12, at 460-61 (recounting an incident of racist graffiti at a school where his sister taught and criticizing claims that such incidents are "isolated").

specific context that motivated Lawrence. Specific examples—even those that evoke an understandable, immediate and visceral response—may not always be the best guide to general solutions for complicated problems.[97]

Judgment can be distorted by being too close to a problem as well as by being too far away. This is especially true in the area of speech, since so much controversial speech touches upon our deepest beliefs about ourselves and our society. The First Amendment protection of free speech is so strong in large part because speech can so easily elicit a harsh and immediate response from a government that is in the business of responding to the popular emotion of the moment. In recent history, one of the prime purposes of the First Amendment has been to prevent government overreaction to speech that causes great psychic distress to those who have access to government power, but which does not immediately and directly incite some illegal action or undercut the more typical governmental means of responding to antisocial activity.[98] In a way,

---

[97] A related point has been made by Daniel Farber and Suzanna Sherry regarding the recent trend toward "storytelling" as a framework for legal analysis. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) ("[S]torytellers need to take greater steps to ensure that their stories are accurate and typical, to articulate the legal relevance of the stories, and to include an analytic dimension in their work.").

[98] The flag-burning cases are the best example of this First Amendment function. *See* United States v. Eichman, 496 U.S. 310 (1990) (holding that prosecution for flagburning in violation of the Flag Protection Act of 1989 cannot be justified on content-neutral grounds and thus violates the First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (holding unconstitutional a Texas statutute criminalizing desecration of the flag based on offensiveness of the expression).

Another variation on this theme is Vincent Blasi's argument that "the overriding objective at all times should be to equip the [F]irst [A]mendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically." Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985). Blasi specifically emphasizes the dangers represented by the "instinct toward intolerance" that periodically characterizes the political system in this (and probably every other) country:

> Because the instinct to suppress dissent is basic, primitive, and aggressive, it tends to have great momentum when it breaks loose from the shackles of social constraint. Aggression is contagious, and hatred of strangers for what they believe is one of the safest and most convenient forms of aggression. The problem is compounded by the fact that the suppression of dissent ordinarily is undertaken in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the supposed true values of the political community.

Id. at 457.

the speech-protective Supreme Court is doing exactly what postmodernist theory would have it do, which is to view skeptically the pronouncements of a body of officials whose judgment is very likely clouded by self-interest, shortsightedness and the fear of loss that always accompanies social privilege.

None of this criticism is meant to suggest that Professors Sunstein or Lawrence or any of the other postmodern censors are deluded or irrational or incapable of accurately perceiving or describing reality. I mean only to take note of the fact that the postmodernists cannot escape the corrosive effect of their own arguments regarding social constructionism and distorted preferences. If everyone's view of the world is irretrievably distorted by the observer's socially constructed psyche, then no one, including the postmodern critics of present reality, can escape their own distorted perceptions in order to critique society and suggest solutions to our problems. Any suggestions for social reform should be viewed as distorted, the product of cognitive dissonance, and/or generated by "interest-induced beliefs on the part of the beneficiaries of existing practice."[99] The status quo is tainted, but then again so is every alternative to the status quo. There is no way out of the logical loop of social constructionism, which suggests that even if (and perhaps especially if) the postmodernists are right, we should be deeply suspicious of proposals that give any group of political actors the unchecked authority to "take private preferences as an object of regulation and control."[100]

3. The Political Flaw

Even assuming that the postmodern censors have correctly described the problem of antisocial speech and are not overreaching in their proposals for the suppression of that speech, it is unlikely that these theorists could ever achieve their ultimate goal of a society effectively cleansed of the ideas and expression targeted by their proposals. The third flaw of social constructionism—which I have labelled the "political flaw"—relates to this problem. The political flaw arises because the postmodern censors routinely assume that adoption of their first proposal (recommending the elimination of judicially enforced constitutional protection for antisocial speech) will lead inevitably to the adoption of their second proposal (recommending specific legislative action to suppress racist, sexist

---

[99] Sunstein, *supra* note 52, at 1544.
[100] Sunstein, *supra* note 63, at 13.

and other no-value expression). The political flaw is that adoption of the first proposal will not necessarily lead to the adoption of the second because the postmodern censors cannot guarantee that their sympathizers will control the levers of political power. In other words, the censors could easily win the battle to eliminate constitutional protection of speech, only to lose the battle over exactly which forms of speech should be regulated. From the postmodernist perspective, this would create the worst of all worlds because after the postmodern critics have robbed everyone, including themselves, of judicial protection for speech, they may find a government that marches to a very different political drummer. That government could easily conclude that the critical race/feminist/civic republican theories discussed here represent dangerously inflammatory and collectivist ideas that should be suppressed in the interests of good, old-fashioned (that is, pre-1960s) racial, sexual and sociopolitical tranquility.

This possibility is the most obvious flaw in the postmodern censorship literature, and it is therefore somewhat puzzling that none of the theorists proposing new censorship schemes really come to terms with their potential dilemma. One typical postmodernist response to this problem is to claim that the new censorship proposals do not undermine the protections of dissent built into existing First Amendment jurisprudence, but merely propose narrow exceptions to the rule that antisocial speech is protected by the First Amendment unless it incites immediate illegal action.[101] These overtures to general free speech principles are not responsive to the key problem of how to ensure that the "good guys" will obtain and retain political power in the brave new First Amendment world. It would not take much creativity for a deeply conservative government to use the very same social constructionist theory supporting the

---

[101] *See* Lawrence, *supra* note 12, at 434 n.20 ("I have spent the better part of my life as a dissenter. As a high school student I was threatened with suspension for my refusal to participate in a civil defense drill, and I have been a conspicuous consumer of my [F]irst [A]mendment liberties ever since."); *id.* at 438 ("I argue that carefully drafted regulations can and should be sustained without significant departures from existing [F]irst [A]mendment doctrine."); Matsuda, *supra* note 29, at 2356 (proposing "an explicit and narrow definition of racist hate messages [that] will allow restriction while respecting [F]irst [A]mendment values"); Sunstein, *supra* note 83, at 315 (proposing that the government be allowed to regulate nonpolitical speech—such as pornography and hate speech—on a much lower showing of harm than the courts presently require, because the "speech . . . serves few or none of the goals for which speech is protected, and . . . causes serious social harms").

postmodern speech regulations to justify the government's own very different ideological ends.

The postmodernists propose that speech should be treated as merely one of many values in the constitutional constellation, and that the elective bodies of government should be given the authority to subordinate free speech values to other social values, such as equality. "We are beginning to realize," Richard Delgado argues, "that . . . judges who set out to be scrupulously fair may not be able to *balance* values in cases, such as those concerning hate speech, when free speech and another value (say community) come into conflict."[102] But "community" is not the only alternative value that the government is permitted to pursue under our constitutional scheme. If the "new paradigm" of speech were adopted to govern First Amendment analysis, there would be nothing to stop a conservative government from claiming that judges are equally incapable of balancing the values of speech and the right to life of a fetus, or judging the immorality inherent in speech that advocates sexual license, homosexuality or drug use. Once we accept the basic postmodern premise that free speech should sometimes be subordinated to other, superior social values, the decision as to which social values are important enough to trump the rights of dissenters to disagree with the political majority about ethical fundamentals becomes a purely political matter.

Many political factions would be happy to adopt the "new paradigm" of free speech in the hope that they could obtain sufficient political power to silence their adversaries and "construct" the values of the next political generation. The potential battle over the right to manage social discourse and control the apparatus of political education would substantially raise the stakes in every political contest. We have already seen a microcosm of this sort of ideological warfare in the battles to control school boards waged by the religious right and their opponents in recent years.[103] Under the "new paradigm" of free speech, control of the government would mean nothing less than the right to train each new generation of citizens in the proper ways of viewing reality. The new regime would turn on its head Justice Thurgood Marshall's notion that "[o]ur

---

[102] Delgado, *supra* note 2, at 173.

[103] *See* Jill Smolowe, *Outfoxing the Right: Moderates Recapture a Handful of School Boards by Publicizing the Obsessions of Ultraconservatives*, TIME, July 10, 1995, at 38, 38 (describing political counterattack by opponents of ultraconservatives who captured control of several school boards in Texas, California and Florida in 1992 elections).

whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[104] Under the "new paradigm," government would be specifically invited to control (or "construct") citizens' minds to ensure that those minds are protected from antisocial values and other forces in society. The new paradigm rejects the essential democratic precept that everyone in society has the right to disagree—verbally, loudly and even obnoxiously—with even the most fundamental values represented by the political majority and its government. Under the present First Amendment regime, everyone has the right to be wrong. Under the "new paradigm" proposed by the postmodern censors, dissidents showing signs of being improperly constructed become candidates for social reconstruction in the values favored by whatever faction happens to control the government at a particular time.

I doubt that any human institution could ever accomplish the comprehensive task of positive social construction that the postmodernists set for government. But if we assume for the sake of argument that a government could accomplish this Herculean feat of social engineering, the postmodernists would be faced with a life-or-death battle over political control that they and their progressive allies could not realistically expect to win. The agreement that racial minorities and other political outsiders would be ill-served by a reduction in First Amendment protection has been criticized as paternalistic.[105] But the postmodernists have no possible response

---

[104] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[105] *See* Delgado & Yun, *supra* note 95, at 876-86; Delgado, *supra* note 2, at 172-73. Although Delgado has argued that such arguments are paternalistic, he has himself made a similar argument in criticizing Robin West's proposal that social activists should replace their reliance on judicially enforced individual rights with a focus on legislatively enforced individual moral responsibilities. *See* Robin West, *The Supreme Court, 1989 Term—Forward: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 103 (1990) ("The impetus for individual freedom . . . must come from the responsible citizen, the thoughtful and empathetic juror, the caring parent, and the careful legislator, not from Herculean judges."). Delgado's response to West's application of this proposal to speech mirrors my argument in the text:

> According to West, even though a citizen has a *right* to speak, the message of that speech is still subject to societal scrutiny because some messages are so antisocial that they should not be spoken. Will this approach single out a Madison Avenue advertising firm that is trying to sell large, gas-guzzling cars, or will it scrutinize the flag-burner or ghetto resident who shakes a fist and shouts "Pigs, out!" at a passing patrol car? The irresponsible label will be reserved for speech that makes us uncomfortable, or that violates majoritarian values and standards. This is not a serious problem for Vaclav Havel's Czechoslovakia, whose relatively homogeneous population is united by a common history. In ours, . . . it is.

to the simple fact that the numbers are against them. If the government is allowed to regulate speech to advance other social goals, the social goals that will most often be cited as a justification for regulating speech are the goals that appeal to the political majority. This majority will by definition be composed of groups and individuals that represent the status quo—the same status quo that is the source of the negative social conditioning that the postmodernists oppose. If the postmodernists dislike the way mainstream private institutions shape public perceptions and preferences now, they will be exponentially more distressed when those institutions gain the ability to coordinate their efforts with a compliant government.

4. The Theoretical Flaw

The various postmodernist censorship theories are plagued by one simple theoretical flaw: Although the stated objective of all these theories is to create a more egalitarian political system, the theories actually produce a political system that is inherently and irrevocably elitist. The main source of this elitism is the social constructionist underpinning of all postmodern theories.

When reduced to their most basic objective, all postmodern censorship theories purport to be a method by which those who have previously been denied the opportunity to participate fully in the political or social system will gain access to democratic government. Explanations and defenses of postmodern censorship theories commonly stress that speech-regulation proposals are designed to advance the interests of groups that have been left outside traditional, mainstream political discourse. The theory is that by eliminating speech attacking or denigrating outsiders such as racial minorities or women, members of insider groups will eventually view the outsiders more favorably, will include members of traditional out-groups in the new, postmodern political discourse, and will ultimately share power with the outsiders. At the same time, the targets of the denigrating speech will be emboldened by the new protection offered to them by a postmodern government, which will encourage them to seek and use political power in the manner that in-groups have done for generations. This is the theory: inclusive, democratic and egalitarian.

Richard Delgado, *Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating*, 71 B.U. L. REV. 525, 529-30 (1991) (footnotes omitted). Richard Delgado, meet Richard Delgado.

Unfortunately, this democratic and egalitarian theory is elitist to its core. This is the inevitable conclusion given the postmodernists' recommendation that we take a system that exists largely without central controls over expression (the old paradigm) and replace it with one in which a single powerful entity—the government—would have the authority to approve or disapprove of the expression of anyone on any subject that the government decides must be regulated for the sake of other, more important social values (the new, postmodern paradigm). As this dichotomy indicates, there are only two possible systems of free expression—a system in which top-down regulation of expression is the exception, and a system in which top-down regulation is the rule.[106] A system in which top-down regulation of expression is the exception at least attempts to allocate to nongovernment actors the right to choose their particular worldview and make their own basic decisions about social values. These decisions may be heavily influenced by the world around each citizen, but the world is a chaotic place, and the absence of systematic indoctrination ensures that every view can at least potentially be heard. A system in which top-down regulation is the rule makes basic value choices a matter for collective determination and control. This is an elitist system because in any large, complex, modern society, political decisions will always be made by a select group that inevitably will contain only a fraction of the general population.

The elitism inherent in the postmodern approach to speech becomes especially troubling when it is combined with the absolute moral certainty with which many of the postmodernists assert their counterspeech values. When Mari Matsuda writes that "[w]e can attack racist speech—not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong,"[107] she articulates the sort of absolutist position that contains the seeds of antidemocratic disaster when imposed collectively by the government through common sanctions such as civil

---

[106] Melville Nimmer has made the same point about attacks on marketplace theories of free speech:

> If acceptance of an idea in the competition of the market is not the "best test" . . . [then] what is the alternative? It can only be acceptance of an idea by some individual or group narrower than that of the public at large. Thus, the alternative to competition in the market must be some form of elitism.

MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02[B], at 1-12 (student ed. 1984).

[107] Matsuda, *supra* note 29, at 2380.

fines and criminal penalties. Every individual in society has a set of moral absolutes such as Matsuda's, and most of us would share Matsuda's observation quoted above. But it is precisely because conflicting moral absolutes are by definition irreconcilable that the First Amendment is presently interpreted to prevent those who control the government from imposing their moral absolutes on those who would openly disagree. The postmodernists' alternative is not only elitist and antidemocratic, but also dangerous in more basic ways. Justice Jackson's famous reminder that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard"[108] still applies—even to opinions that the government believes are clearly wrong.

Finally, as with the other flaws in postmodern censorship theory, the theoretical flaw provides an opportunity to turn social constructionism against the postmodernists who champion it. The postmodernists' proposal to permit government to regulate speech that implicates other important social values would teach politicians undesirable lessons about their presumptively superior knowledge, perspective and infallibility. Giving politicians more power to "construct" their constituents would simply reinforce the arrogance of power that is already the bane of any democratic political culture. The First Amendment may have its problems, but at least in its consistent message of deep skepticism about the validity of power and its uses, the Amendment contributes to the "construction" of a more manageable variety of politician.

II. POSTMODERN CENSORSHIP AND THE PUBLIC/PRIVATE DISTINCTION

A common theme of all postmodern censorship arguments is that expression such as pornography, hate speech and other "no-value" communication reflects values that society knows are wrong. For example, Mari Matsuda argues that racism is "an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse."[109] Presumably, Catharine MacKinnon would say the same thing about pornography, and there are undoubtedly other examples of what Richard Delgado calls "no-value speech,

---

[108] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

[109] Matsuda, *supra* note 29, at 2357.

or negative-value speech, which not only could, but should be restricted[.]"[110]

The key to the postmodernist position on "no-value" or "negative value" speech is that regulation of this speech is merely a means to a much more comprehensive end. The postmodernists would have the government regulate examples of "no-value" speech not primarily to cleanse public discourse, or even to protect the immediate targets of offensive expression, but rather to erase the ideas themselves from the minds of everyone in society. The main purpose of postmodern speech regulation is to reconstruct fundamentally how everyone in society views the world. As Delgado notes,

> we use symbols to construct our social world, a world that contains categories and expectations for "black," "woman," "child," "criminal," "wartime enemy," and so on. Once the roles we create for these categories are in place, they govern the way we speak of and act toward members of those categories in the future.[111]

This is the essence of the social constructionist arguments discussed in the previous section. Taken to their logical conclusion, these arguments indicate that the postmodern censors will have achieved their ultimate goal only when they have completely revised every individual's ideas about social relations.

Given the background provided by the social constructionist arguments, it is almost a logical necessity that the postmodernists reject efforts to insulate some aspects of personal expression from government control. Under postmodern censorship theory, anything that contributes to the development of social values or political perspectives should be subject to government regulation, even if the influence occurs outside the traditional public sphere. Thus, the second cornerstone of postmodernist censorship is the renunciation of the public/private distinction. In Cass Sunstein's modest formulation, "a democratic government should sometimes take private preferences as an object of regulation and control."[112] Any attempt to preserve a sphere of private communication and enculturation would doom postmodern efforts to instill proper democratic values and eradicate "historically untenable and dangerous" ideas such as racism or sexism.

---

[110] Delgado, *supra* note 2, at 173 (footnote omitted).
[111] Delgado & Yun, *supra* note 95, at 878-79 (footnote omitted).
[112] Sunstein, *supra* note 63, at 13.

Attacks on the public/private distinction have been a common component of critical race, feminist and civic republican literature for many years. The nature of the analyses, however, is somewhat different. The critical race theorists and feminists emphasize that the preservation of a private sphere has historically subjugated women and racial minorities. The civic republicans focus on the perceived inconsistency in the way courts have treated governmental regulation of economic affairs, as compared with the way courts have treated governmental regulation of antisocial speech. The civic republicans liken the courts' approach in the speech cases to the notorious *Lochner* decision,[113] in that the speech cases require governmental neutrality and thereby reinforce the status quo. Since the critical race/feminist and civic republican arguments raise different issues, they will be addressed separately.

A. *The Critical Race and Feminist Attacks on the Public/Private Distinction*

Criticism of the notion that the government should respect a realm of "private" expression has long been a fixture in both critical race and feminist literature. Feminists, in particular, have produced a large body of work analyzing the concept of privacy, including private expression. In many ways, criticism of the concept of privacy is the linchpin of Catharine MacKinnon's version of feminism. She views the legal protection of privacy as a key way in which government has historically shunted the concerns of women into a no-woman's-land, and excluded women from the sorts of protective social intervention that have traditionally protected men. I will leave for others a comprehensive critique of the broader literature,[114] and focus here on the elements of the feminist critique that inform that critique's stance on the regulation of speech such as pornography.

---

[113] *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution"), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[114] An excellent starting point is: Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 2 (1992) ("When the external elements of [the feminist challenge to the public/private distinction] become too sweeping, . . . they become misleading and counterproductive and may actually facilitate the devaluation of important aspects of human life that are currently identified as 'private' and 'personal.'").

The feminist critique of privacy is a subset of the theory's broader critique of the concept of human freedom. At its most extreme, this critique denies the very existence of freedom—especially freedom cast in the form of free will. MacKinnon's statement that, "[t]he liberal ideal . . . holds that, so long as the public does not interfere, autonomous individuals interact freely and equally,"[115] correctly points out that the concept of privacy is closely tied to notions of human freedom, and that both freedom and privacy are essential elements of liberal democratic theory. According to MacKinnon, these presumptions of freedom are inapplicable to women:

> [Privacy] is personal, intimate, autonomous, particular, individual, the original source and final outpost of the self, gender neutral. It is, in short, defined by everything that feminism reveals women have never been allowed to be or to have, and everything that women have been equated with and defined in terms of *men's* ability to have.[116]

The liberal notion of privacy is, according to MacKinnon, "a right of men 'to be let alone' to oppress women one at a time. It embodies and reflects the private sphere's existing definition of womanhood. . . . It keeps some men out of the bedrooms of other men."[117]

The feminist critique of privacy is bound with the claims of social constructionism discussed in the previous section. MacKinnon opposes the protection of privacy because she believes that privacy provides the matrix for the oppressive construction of gender. "[Privacy] has preserved the central institutions whereby women are *deprived* of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced."[118] Thus, human freedom is nonexistent because women (and men as well, albeit in different ways) are "taught" to be unfree.

According to MacKinnon, pornography is a primary means of creating and sustaining this mindset of intellectual bondage, and the concept of privacy is a primary means of maintaining the dominance of pornography and the pornographic worldview. "To the extent that pornography succeeds in constructing social reality, it becomes

---

[115] CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED, *supra* note 34, at 93, 99.

[116] *Id.*

[117] *Id.* at 102 (footnote omitted).

[118] *Id.* at 101.

invisible as harm."[119] MacKinnon contends that pornography's success is attributable largely to the fact that liberal theory has carved out an area of privacy in which the state cannot effectively respond to pornography's lessons. She views *Stanley v. Georgia*[120]—in which the Supreme Court prohibited the state from prosecuting the private possession of legally obscene materials—as a virtually pure example of this tendency. In contrast to Justice Marshall's vigorous opposition in *Stanley* to "the assertion that the State has the right to control the moral content of a person's thoughts,"[121] MacKinnon prefers state control. After considering the alternatives, MacKinnon concludes: "[W]hile defenders of pornography argue that allowing all speech, including pornography, frees the mind to fulfill itself, pornography freely enslaves women's minds and bodies inseparably, normalizing the terror that enforces silence from women's point of view."[122]

In MacKinnon's view, protection of privacy amounts to protection of systematic domination. In this way, MacKinnon views privacy as an automatic ally of the status quo. Specifically, she asserts that "[t]he existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect."[123] MacKinnon would abandon the protection of privacy, as well as every other major premise of current First Amendment doctrine, including the "most basic assumption" that any speech is truly free. She would, quite literally, turn First Amendment doctrine on its head and impose a new definition of "freedom" in the form of government control in the service of particular social goals. This new definition is necessary because "[f]or women, the urgent issue of freedom of speech is not primarily the avoidance of state intervention as such, but finding an affirmative means to get access to speech for those to whom it has been denied."[124] This means not just expanding the universe of speakers by using government resources to give women and other subjugated people access to the means of communication; it means using the coercive apparatus of government to suppress pornography and other "expressive means of practicing inequality,"[125] even if they occur in private.

---

[119] *Id.* at 155.
[120] 394 U.S. 557 (1969).
[121] *Id.* at 565 (footnote omitted).
[122] MACKINNON, *supra* note 34, at 155.
[123] MACKINNON, *supra* note 115, at 101.
[124] *Id.* at 158.
[125] MACKINNON, *supra* note 46, at 107.

The critique of the critical race theorists' public/private distinction is similar to MacKinnon's analysis, although the critical race version of the critique tends to focus on the specific ways in which (according to the critical race theorists) government protection of speech reinforces the discriminatory messages of private speech. For example, Matsuda argues that by providing legal protection for racist speech the government surreptitiously endorses the content of that speech and magnifies the injury to those targeted by the speech. She interprets the government's refusal to sanction racist speech (because of existing First Amendment rules) as functionally indistinguishable from explicit governmental endorsement of racism. Thus, according to Matsuda:

> State silence . . . is public action where the strength of the new racist groups derives from their offering legitimation and justification for otherwise socially unacceptable emotions of hate, fear, and aggression. . . . [T]he law's failure to provide recourse to persons who are demeaned by the hate messages is an effective second injury to that person.[126]

Lawrence also organizes his criticism of current First Amendment law around the assertion that First Amendment theory fails to take into account private as well as public harms. He argues that "First Amendment doctrine and theory have no words for the injuries of silence imposed by private actors."[127] Lawrence asserts that these private "injuries of silence" are analogous to government censorship and should therefore be a factor in First Amendment analysis. Specifically,

> First Amendment law ignores the ways in which patriarchy silences women, and racism silences people of color. When a woman's husband threatens to beat her the next time she contradicts him, a First Amendment injury has occurred. "Gay-bashing" keeps gays and lesbians "in the closet." It silences them. They are denied the humanizing experience of self-expression. We *all* are denied the insight and beauty of their voices.[128]

According to Lawrence, the government's refusal to recognize these injuries is attributable to "the mystifying properties of constitutional ideology," such as the state action doctrine and the public/private dichotomy that is implicit in the state action doctrine.[129]

---

[126] Matsuda, *supra* note 29, at 2378-79.
[127] Lawrence, *supra* note 33, at 801.
[128] *Id.* at 802-03 (footnotes omitted).
[129] Lawrence, *supra* note 12, at 444.

Lawrence makes two conceptually distinct arguments against using the First Amendment to restrict government regulation of private speech. On one hand, Lawrence argues that all aspects of privacy—including private speech—are problematic because "we naively believe that everyone has an equal stake in this value."[130] Lawrence argues that in reality, privacy does not protect everyone equally; therefore, the distinction between private and public actions should be abandoned in favor of a focus on the degree of harm incurred by both private and public actions. This revised analytic focus would tend to favor government regulation of private racist speech in order to prevent "infringement of the claims of blacks to liberty and equal protection."[131]

Thus, according to Lawrence's first argument, the real issue raised by government regulation of hate speech is not whether the government should be permitted to regulate the expression of private speakers, but rather whether "we should balance the evils of private deprivations of liberty against the government deprivations of liberty that may arise out of state regulations designed to avert those private deprivations."[132] Presumably, government censorship would be permitted if the government determined that the degree of harm created by the private speech outweighed the degree of harm created by the government censorship. Of course, this balancing approach towards censorship would mean that the extent of the government's legal authority to regulate speech would be determined by the government itself. This government determination, however, is an unavoidable consequence of eliminating the public/private distinction and the concept of limited public authority on which the public/private distinction depends.

In contrast to Lawrence's first argument, he also argues (along the lines of Matsuda's argument quoted above[133]) that by refusing to censor racist speech, "the government is involved in a joint venture with private contractors to engage in the business of defaming blacks."[134] Lawrence's second argument does not necessarily entail an outright attack on the public/private distinction because it asserts that the state action requirement of the Fourteenth and First Amendments is met by the failure of the state to regulate

---

[130] *Id.* at 445.
[131] *Id.* at 446.
[132] *Id.*
[133] *See supra* note 126 and accompanying text.
[134] Lawrence, *supra* note 12, at 446.

racist speech. According to this argument, the government has merely "hand[ed] over the copyright and the printing presses to its partners in crime"[135] and, therefore, has converted an ostensibly private action into an action of the state. Lawrence bolsters this claim with the contention that "there has not yet been satisfactory retraction of the government-sponsored defamation in the slavery clauses, the *Dred Scott* decision, the black codes, the segregation statutes, and countless other group libels."[136] Thus, according to this argument, the regulation of private speech is necessary to fulfill the government's obligation to "disestablish[] the system of signs and symbols that signal blacks' inferiority."[137] This obligation apparently can be fulfilled only by government action to eradicate the very idea of racism from both the public and private areas of the culture.

Although Lawrence's two arguments are conceptually distinct, they lead to the same results: The elimination of the First Amendment as an effective limit on the government regulation of speech and the imposition of a straight balancing analysis for the determination of whether government regulations of speech are constitutionally permissible. In the critical race theory formulation, the First Amendment's protection of intellectual freedom from government control becomes merely one among many "narratives" of constitutional adjudication and political power.[138] As noted in the introduction to this Article, the critical race theorists (along with other postmodern censors) treat their proposal as benign, noble, and progressive; in their own terms, they are proposing "a more nuanced, skeptical, and realistic view of what speech can do, one that looks to self- and class interest, linguistic science, politics, and other tools of the realist approach to understand how expression functions in our political system."[139] At the same time, the critical race theorists (again, along with other postmodernists) leverage other constitutional amendments against the First to support their claim that they intend merely to bring the First Amendment in line with other values expressed in the Constitution. Under the present

---

[135] *Id.*

[136] *Id.* at 447 (footnotes omitted).

[137] *Id.* at 449.

[138] *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 346-47 (1991) (juxtaposing First Amendment narrative emphasizing intellectual freedom and resistance to official censorship, "superstition and enforced ignorance" with the minority-protection narrative emphasizing the fight against slavery, segregation and racial injustice).

[139] Delgado, *supra* note 2, at 170.

system, Richard Delgado argues, "free speech [is] a powerful asset to the dominant group, but a much less helpful one to subordinate groups."[140]

The broad nature of the critical race theorists' attacks on the public/private distinction implicit in the First Amendment belies their claims of moderation and their commitment to "nuance." The postmodernists' efforts to undermine the very concept of privacy take them well beyond the point of simply fine-tuning the ordering of constitutional values, and force them to embrace a proposal that is much more radical. The postmodernist attack on current First Amendment doctrine incorporates a rejection of the very notion of limited government. If the public/private distinction were abandoned, every individual activity would become "public" and, therefore, subject to government control. And if everything were public, there would no longer be any limitation on the power of government to do the bidding of any set of powerful political actors. This amounts to nothing less than the deconstitutionalization of American jurisprudence. Under such a system, the axiom "the personal is political" would take on a meaning much different and more insidious than the one usually intended by the politically progressive theorists who are fond of repeating the phrase. The specific implications of the critical race and feminist positions are pursued in the next subsection.

B. *The Flaws in the Critical Race and Feminist Approaches to the Public/Private Distinction*

1. The Antidemocratic Flaw

The First Amendment model that the critical race theorists and feminists attack incorporates three of the most basic principles of constitutionalism: that individuals are separate from the government; that the government is the servant of its citizens rather than vice versa; and that the government may not use its coercive tools to prevent political attacks on one political faction or coalition of factions, or to enshrine any political ideology as permanent and unassailable. The concept of "privacy" arises directly from these principles. Indeed, it is the specific embodiment of the first principle—that the government is an institution unto itself, which exists apart from the citizens served by that government.

---

[140] Delgado, *supra* note 138, at 385-86.

The concept of privacy reflects the recognition that even a responsive democratic government often will have institutional interests, values and objectives that are quite distinct from those of individual citizens. Many of these conflicting governmental and individual interests will relate to the most fundamental personal and social values. When the reality of fundamentally conflicting interests is combined with the seductive possibilities presented to the government by its monopoly on the authorized use of absolute power—jails, guns, electric chairs—the prospect always exists that the government will attempt to use its power to settle matters of fundamental value once and for all in favor of its own preferred way of perceiving and organizing the world. At that point, the public/private dichotomy would be eliminated, but then again so would the possibility of democratic self-governance. Since every citizen would merely reflect the government's own preferred brand of political and social reality, it would no longer be possible to claim that the citizens are deciding anything, except in the farcical Soviet sense of unanimous citizen certification of a foregone political conclusion.

The central flaw in the feminist and critical race critiques of the public/private distinction is that these critiques cannot be reconciled with democracy's basic need for some separation between the governors and the governed. Without that separation, democracy cannot exist because there is no group capable of providing popular consent to the government's exercise of power. Likewise, if the government is permitted to break down barriers of privacy and exert direct control over the thoughts and attitudes of the public on matters of great political importance, it will no longer be possible for the public to reject one government and replace it with another government representing a radically different ideological stance. Without this possibility of ideological change, it is difficult to see how such a government could be accurately described as democratic.

MacKinnon is correct when she describes privacy as the cornerstone of liberal democratic theory,[141] but the assertion would be equally true even if she omitted the qualifier "liberal," because some fairly substantial degree of individual independence from government—i.e., "privacy"—is necessary for any conception of democracy. An attack on privacy, therefore, is necessarily also an attack on democracy.

---

[141] *See* MACKINNON, *supra* note 115, at 99.

Just as the preservation of a realm of protected individual activity is necessary for democratic theory, the elimination of the public/private distinction is equally necessary to fulfill the objectives of the postmodern censors. Eliminating the protected realm of individual privacy is necessary to facilitate the reeducation of citizens, which postmodernists believe must occur to counteract the negative social construction that has taken place in the unregulated marketplace of speech. The postmodern censors want to abandon much of First Amendment jurisprudence because in their view basic, necessary social change cannot occur without fundamentally changing the way people think about themselves and their fellow citizens. Thus, controlling contrary speech and ideas is actually more important than any other function of government.

It would be difficult to overstate the importance of these arguments in postmodern censorship theory. One example of how seriously the postmodernists take the public/private issue can be found in one of Delgado's articles on the subject of hate speech regulation. Delgado argues that traditional civil rights laws will inevitably fail if the government does not first take control of citizens' attitudes concerning racial matters:

> Not only does racist speech, by placing all the credibility with the dominant group, strengthen the dominant story, it also works to disempower minority groups by crippling the effectiveness of *their* speech in rebuttal. . . . Unless society is able to deal with this incongruity, the [T]hirteenth and [F]ourteenth [A]mendments and our complex system of civil rights statutes will be of little avail. At best, they will be able to obtain redress for episodic, blatant acts of individual prejudice and bigotry. This redress will do little to address the source of the problem: the speech that creates the stigma-picture that makes the acts hurtful in the first place, and that renders almost any other form of aid—social or legal—useless.[142]

It is difficult for many of us to think of the various Civil Rights Acts enacted since 1957 as covering only "episodic, blatant acts of prejudice."[143] Provisions such as the public accommodations

---

[142] Delgado, *supra* note 138, at 385-86.

[143] *Id.*; *see, e.g.*, Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.) (creating the Commission on Civil Rights and establishing causes of action to enforce voting rights); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18 U.S.C., 20 U.S.C. and 42 U.S.C.) (amending Civil Rights Act of 1957 to expand protection of voting rights and to extend the power of the Commission on Civil Rights); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241

section of the 1964 Civil Rights Act,[144] for example, changed the nature of daily life in very basic ways for the entire country. But Delgado's diminution of these regulations seems quite serious. Note the last sentence quoted above: Delgado asserts that in the absence of government control of speech almost any other form of aid will be *useless*—not simply less effective. Along the same lines, Delgado suggests in another article that affirmative action programs will fail to achieve their integrationist purpose if the hearts and minds of those affected by such programs are not captured first.[145]

This dismissive attitude toward the potential accomplishments of social welfare legislation enacted and enforced in the face of continuing political dissent is surprising not because it is new and radical, but because it is commonplace and reactionary. Every political interest group in a pluralist democratic society fervently wishes that it could convince its political opponents to forego their opposition and get with the program. Likewise, every political faction asserts that it represents more than one group's particular interests; every faction tries to cloak its position in the grandiose terms of fundamental justice and eternal righteousness. These characteristics are common to every political activist because they reflect the typical and understandable fear of finally capturing the government and enacting favorable legislation, only to lose both the government and the legislation at the next election. No political group likes to think of its hard-won accomplishments as temporary and tenuous. So every political group has at the back of its mind the prospect posed by the postmodernists: Once we win power, let us devise a method whereby we get to keep it.

(codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.) (outlawing employment discrimination on the basis of race and racial discrimination in public accommodations); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18 U.S.C., 25 U.S.C., 28 U.S.C. and 42 U.S.C.) (establishing fair housing policy); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (prohibiting racial bias of any kind in employment as well as in the making and enforcement of contracts, and establishing the Glass Ceiling Commission).

[144] *See* 42 U.S.C. § 2000a (1994).

[145] He argues:

> Incessant depiction of a group as lazy, stupid, and hypersexual—or ornamental for that matter—constructs social reality so that members of that group are always one-down. Thereafter, even the most scrupulously neutral laws and rules will not save them from falling further and further behind as private actions compound their disadvantage. Affirmative action becomes necessary, which in turn reinforces the view that members of these groups are naturally inferior (because they need special help).

Delgado, *supra* note 2, at 171-72 (footnote omitted).

2. The Flaw of Political Naiveté

The second flaw in the critical race and feminist attacks on the public/private distinction is the flaw of political naiveté. Specifically, what makes the postmodernists believe that their preferred set of values will be chosen as the rationale for government intervention into what are now constitutionally protected areas of individual value formation and expression? To the extent that critical race theorists and feminists attempt to answer this question in the abstract, their responses typically resemble Delgado's argument that "speech which constructs a stigma-picture of a subordinate group stands on a different footing from sporadic speech aimed at persons who are not disempowered[.]"[146]

The problem with this formulation, as with many other aspects of postmodern censorship theory, is that it could easily be turned to very different political ends. For example, it would not be difficult for an anti-abortion government to argue that fetuses are "disempowered," and that speech advocating abortion or advising women how to obtain an abortion is speech "construct[ing] a stigma-picture of a subordinate group,"[147] which must be suppressed.

Related postmodern arguments, such as the claim that the government is part of a "joint venture"[148] with antisocial speakers, also may be used against the political interests represented by the postmodern censors. Once the notion that the government is directly responsible for speech by private persons replaces the current First Amendment model, the "joint venture" notion will be available for use by any political group that captures control of the government. An anti-abortion government could logically claim that all expression favoring unfettered abortion rights, both public and private, must be suppressed because otherwise the government would be engaged in a "joint venture" with baby-killers.

Ensuring that the broad new speech-regulation powers they give to the government will not be used against them is a persistent problem for the postmodern censors. Once abstract justifications for government suppression (protecting "subordinate groups"; preventing "joint ventures") are shown to be politically insecure, the postmodernists' only response to the problem is the *ipse dixit* that their own specific preferences and political values are inherently

---

[146] Delgado, *supra* note 138, at 386.
[147] *Id.*
[148] Lawrence, *supra* note 12, at 446.

different—i.e., more important—than those of their political adversaries. Delgado articulates the premise that suffuses other critical race and feminist writings when he asserts that "race—like gender and a few other characteristics—is different; our entire history and culture bespeak this difference."[149]

As Delgado himself notes, however, "[i]t might be argued that *all* speech constructs the world to some extent, and that every speech act could prove offensive to someone. Traditionalists find modern art troublesome, Republicans detest left-wing speech, and some men hate speech that constructs a sex-neutral world."[150] So what is the postmodernists' guarantee that the government would only regulate private speech pertaining to race and gender and other postmodern concerns? Simple—they must be sure to control the government, because in the new, postmodern world of expression, the people who control the government get to decide for everyone which interests can be attacked through expression and which ones are sacrosanct. In short, under the postmodern system we must rely for our intellectual liberty on the wisdom, knowledge, moderation and good judgment of politicians.

This is especially problematic in light of the fact that the postmodern arguments against the public/private distinction in the First Amendment area also have consequences for related areas of civil liberties such as Fourth Amendment search and seizure law. If the postmodern censors are serious about renouncing the public/private distinction, then they should have no problem breaking down the constitutional barriers that now obstruct the government's efforts to see, hear and regulate the expressive activities that occur behind the closed doors of a private home. And if the postmodern censors are serious about the need to restrict racist (or sexist or otherwise impolitic) speech that "constructs a stigma-picture of a subordinate group,"[151] then they should be anxious to suppress that speech regardless of the form in which the speech appears.

So, does this mean that under a broadly drafted hate-speech (or pornography) statute, the simple possession of a copy of *Mein Kampf* (or *Debbie Does Dallas*) could be criminalized? If so, would probable cause that someone possesses such a book (or video) justify a search warrant permitting the police to roam at will through that person's private library?[152] What if the police find other questionable

---

[149] Delgado, *supra* note 138, at 386.

[150] *Id.*

[151] *Id.*

[152] Recall, in contrast to the prevailing postmodern attitude, Justice Thurgood

materials during the course of the search? Could they seize these additional materials until they had a chance to scrutinize them carefully for unacceptable ideas? Then, of course, there would arise the inevitable problems of interpretation. Is *Birth of a Nation* equivalent to *Mein Kampf*? Is *Huckleberry Finn*?[153] Would the police understand the difference?[154] Would a properly "constructed" jury? Finally, recall the dilemma confronting the postmodern censors if their side loses the election after the courts are convinced by their arguments regarding social constructionism and their proposals to eliminate constitutional protection of the private realm. Catharine MacKinnon could easily find herself listed beside Andrea Dworkin[155] on some postmodern conservative government's *Index Librorum Prohibitorum*.[156]

Marshall's approach to this question: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[153] In an era when the Mark Twain House has to hold a week-long conference as "a pre-emptive effort to bolster the nerve of teachers and keep the book [*Huckleberry Finn*] . . . from becoming a victim of the culture wars over 'political correctness,'" this question is posed more seriously than it should need to be. *See* Jonathan Rabinovitz, *"Huckleberry Finn" Without Fear: Teachers Gather to Learn How to Teach an American Classic, in Context*, N.Y. TIMES, July 25, 1995, at B1.

[154] On this point, note the use by the Canadian police and customs officials of the Canadian Supreme Court's *Butler* decision. *See* Regina v. Butler, [1992] 1 S.C.R. 452. In *Butler*, the Canadian court held that the Canadian Charter of Rights and Freedoms permits the government to regulate, by means including criminal sanctions, expressive materials that "dehumanize men or women in a sexual context." *Id.* at 510. According to the Canadian court, such regulations "demonstrate[] our community's disapproval of the dissemination of materials which potentially victimize women" and have a "negative influence . . . on changes in attitudes and behaviour." *Id.* at 504. After *Butler* broadened government authority to regulate sexual expression, the proprietor of The Glad Day Book Shop, a prominent Toronto gay and lesbian bookstore, told a *New Yorker* reporter that:

> I'd guess that at least one in three of our shipments from the States is opened, and [Canadian authorities] detain at least one shipment of books a month .... They tell me they're shipping the books to Ottawa to determine whether they're obscene. Once they do that, there's really nothing you can do but wait.

Jeffrey Toobin, *X-Rated*, NEW YORKER, Oct. 3, 1994, at 70, 72. Books seized by Canadian customs (some of which were later released) include a book of short stories entitled *A Place I've Never Been* by David Leavitt, a novel entitled *The Whistling Song* by Stephen Beachy, *The Devil's Advocate* by Ambrose Bierce, *The Man Sitting in the Corridor* by Marguerite Duras, *Black Looks: Race and Representation* by Bell Hooks, comic books by R. Crumb, Art Spiegelman and Matt Groening, and selections from the Asterix and Tintin series. *Id.* at 73-74. Also, ironically and predictably, two of Andrea Dworkin's books were briefly detained as obscene. *Id.* at 74.

[155] *See* Toobin, *supra* note 154, at 74.

[156] The *Index* was published by the Roman Catholic Church and consisted of a list

All of this is intended to make a simple point: The government cannot regulate a private person's "bad" ideas without adopting a style and scope of government power that goes far beyond what any democratic populace should permit. The concept of "privacy" in all its manifestations is one way of preventing just this sort of government overreaching. If the postmodern censors do not like the public/private distinction, then perhaps they should think of restrictions on government regulation of speech and ideas as flowing from the mind/body distinction. A nontotalitarian government can control the body of its citizens, but should be absolutely prohibited from controlling their minds.

3. The Flaw of Rhetorical Excess

The final flaw in the feminist and critical race critique of the public/private distinction relates to the rhetorical excesses frequently exhibited in this branch of postmodern censorship literature. Many of the observations and descriptions used by the postmodern censors to support their proposals are so overstated and one-dimensional that they cast doubt upon the theorists' conclusions. Such statements also suggest that the postmodern censorship proposals are intended to be more expansive than their proponents readily admit.

Critical race theorists' flaw of rhetorical excess is evident in the various allegations of bad faith that the theorists aim at those who reject their proposals to regulate the racist speech of private persons. One example is Lawrence's claim that the government forms a "joint venture" with racist speakers when it refuses to censor their speech.[157] This implies that the government and those who support strong First Amendment protections of private speech actually endorse the ideas of the racists whose rights they defend. These linkages are a potent rhetorical tool: Free speech is equated with racism, and the simple enforcement of the First Amendment converts private racism into governmental racism. If critical race theorists manage to make these linkages stick, it would become much more difficult, psychologically and politically, for civil libertarians and sympathetic judges to support strong First Amendment protection for unsavory speakers.

---

of immoral books. Reading any of the books listed in the *Index* was considered a sin. In 1966, the Church announced that it would cease publication of the *Index*. *See* 2 CATHOLIC UNIV. OF AM., NEW CATHOLIC ENCYCLOPEDIA 699-701 (1961); 7 CATHOLIC UNIV. OF AM., NEW CATHOLIC ENCYCLOPEDIA 434-35 (1967).

[157] *See* Lawrence, *supra* note 12, at 446.

Sometimes the linkage between private free speech and governmental racism is asserted explicitly. Delgado has argued on several occasions that the predominantly white administrations of universities refuse to support hate-speech regulations because they benefit from the sense of unease that hate speech instills in minority students.

> I believe that racist speech benefits powerful white-dominated institutions. . . .
>
> . . . [T]hey benefit, and . . . they know they benefit, from a certain amount of low-grade racism in the environment. . . . This kind of behavior keeps nonwhite people on edge, a little off balance. We get these occasional reminders that we are different, and not really wanted. It prevents us from digging in too strongly, starting to think we could really belong here. It makes us a little introspective, a little unsure of ourselves; at the right low-grade level it prevents us from organizing on behalf of more important things. It assures that those of us of real spirit, real pride, just plain leave—all of which is quite a substantial benefit for the institution.[158]

Delgado's claim is not limited to the university context. In the broader society as well, Delgado argues that "we must seriously entertain the possibility that low-grade racism benefits powerful whites, including the very ones who most sincerely deplore it and would themselves never utter a racist slur."[159]

Delgado's arguments in support of this bad-faith claim are weak. First, with regard to the university setting, Delgado's judgment that white university administrators tend to oppose hate-speech regulation is inaccurate. Many universities have already adopted speech codes similar to the ones supported by critical race theorists such as Delgado and Lawrence.[160] Indeed, in the statement quoted above, Delgado addresses his comments specifically to "[t]he highly educated, refined persons who operate the University of Wisconsin."[161] Evidently, he misjudged the administration's sentiments at

---

[158] Delgado, *supra* note 138, at 380-81 n.319 (quoting Richard Delgado, Address to State Historical Society, Madison, Wisconsin, Apr. 24, 1989); *see also* Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of 'A Just Balance' Changes So Slowly*, 82 CAL. L. REV. 851, 865-66 (1994) ("We believe a certain amount of unanswered, low-grade racism and hassling on the nation's campuses may even confer a benefit on the *status quo*.")

[159] Delgado & Yun, *supra* note 95, at 885.

[160] According to one study, more than 150 colleges and universities have enacted hate-speech regulations. *See Court Overturns Stanford University Code Barring Bigoted Speech*, N.Y. TIMES, Mar. 1, 1995, at B8.

[161] Delgado, *supra* note 138, at 380 n.319 (quoting Richard Delgado, Address to State Historical Society, Madison, Wisconsin, Apr. 24, 1989).

that school, because less than two months after he made the comments quoted above, the University of Wisconsin Board of Regents adopted a hate-speech regulation (upon the advice of, among others, Delgado) by a vote of twelve to five.[162]

Even if Delgado were correct that predominantly white institutions such as the University of Wisconsin routinely resist adopting hate-speech regulations, his theory of the linkage between opposition to such a regulation and benefits to the administration cannot withstand close scrutiny. In one of his discussions of this topic, Delgado cites a 1980 article by Derrick Bell which argued that desegregation occurred only because there was a temporary convergence of interests between blacks and whites.[163] According to Bell, whites supported desegregation for three main reasons: To promote a positive image of the country to support the government's cold-war efforts against the Soviet Union, to undermine the rising tide of black radicalism, and to promote the industrialization of the South in order to exploit its potential.[164]

Along the same lines, Delgado argues in the statement quoted above that the main benefit to white administrators of permitting racist speech is to squelch activism by minorities. This objective is accomplished, according to Delgado, by keeping most minority students uneasy about their place at the institution, and convincing the braver, more committed students to leave. Unfortunately, if Delgado is correct that neutralizing activism is indeed the goal of administrators at these institutions, then he is probably incorrect about their tendency to oppose hate-speech regulation. If university administrators have the subliminal desire to suppress radical ideas and activism among minority populations at their institutions, would it not be more logical to censor abrasive speech by whites that is likely to serve as a rallying point for radical organizers in the minority community? University administrators are instinctively sensitive to their image among wealthy private benefactors, parents of potential students, and (in the case of public universities) state legislators. Thus, the avoidance of conflict and discord whenever possible is foremost on the mind of every university administrator,

---

[162] *See* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1165 (E.D. Wis. 1991). The regulation was later held unconstitutionally vague and overbroad in federal district court. *Id.* at 1181.

[163] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980), *cited in* Delgado & Stefancic, *supra* note 158, at 863 n.75.

[164] *Id.* at 524-25.

especially if that conflict and discord is likely to get press coverage. It would be logical for an administrator to conclude that the prominent public expression of racist or sexist remarks will almost certainly generate some degree of bad publicity. In this light, it is implausible that university administrators would view themselves, either consciously or subconsciously, as having similar interests to persons expressing overtly racist or sexist views. Long periods full of angry marches and demonstrations held under the harsh glare of television cameras are not the stuff of which successful careers in academic administration are built.

Finally, Delgado's attempt to attribute antisocial private speech to university administrators or other government officials is unconvincing because the argument ignores the political and legal dynamics of free speech protection in this society. Hate speech is protected in most contexts because of First Amendment doctrine developed by the courts, in direct response to efforts by legislatures and government agencies—usually controlled by whites—to suppress that speech.[165] Administrative reluctance to censor racist and other antisocial speech arises not so much from the administrators' inherent sympathy or implicit alliances with racists as it does from a reluctant recognition by the administrators that the courts will not permit them to censor the speech of private persons solely because of the speech's offensive content. Does this mean that predominantly white judges have devised a protective First Amendment jurisprudence because they, too, somehow benefit from the persistence of low-grade racism? Maybe, but the specific benefits low-level racism would provide to life-tenured judges are hard to fathom.

The more plausible explanation is that Delgado's overheated rhetoric about the latent racism of judges and other government officials is just wrong. It may be that the judges who are primarily responsible for providing First Amendment protection to racist speech have done so for entirely honorable reasons—because they are appropriately wary of the many dangers that arise when controversial speech of every sort is subjected to the vicissitudes of any

---

[165] Some obvious examples include R.A.V. v. St. Paul, 505 U.S. 377 (1992) (striking down a St. Paul hate speech ordinance); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (overturning the conviction of a Ku Klux Klan member under an Ohio syndicalism statute and finding the statute to be unconstitutional); UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down the University of Wisconsin's speech code); Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (striking down the University of Michigan's speech code).

political agency, regardless of that agency's racial or political composition.[166]

A final example of rhetorical excess in postmodern critiques of the public/private distinction can be found in Catharine MacKinnon's attempts to link the concept of privacy to the preservation of a paternalistic status quo. MacKinnon argues that privacy is one of the main reasons that women cannot come together to fight their oppression. "When women are segregated in private, separated from each other, one at a time, a right to that privacy isolates us at once from each other and from public recourse."[167] MacKinnon argues not only that privacy is a hindrance to progress, but also that privacy actively facilitates great harm. According to MacKinnon, privacy (and, indeed, individual rights in general[168]) is a concept used by society primarily to protect endless acts of coercion and violent abuse of women: "[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor; has preserved the central institutions whereby women are *deprived* of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced."[169] In general, she says, "[t]his right to privacy is a right of men 'to be let alone' to oppress women one at a time."[170]

The problem with these statements is that they describe an extreme type of privacy that virtually no one advocates. Certainly no one advocates adopting a form of privacy that would permit a person

---

[166] For one recent example of well-intentioned government excess, see Nelson v. Streeter, 16 F.3d 145, 148 (7th Cir. 1994). The court denied qualified immunity to three Chicago city aldermen who physically removed from a student show at the Chicago Art Institute a painting satirizing Mayor Harold Washington. The court noted that qualified immunity was denied because the law was clear at the time of the aldermen's actions that "[city] officials have no more right to enter [the Art Institute] uninvited and take the art off its walls than they would have to enter a private home and take 'offensive' art off its walls." *Id.*

If the postmodern censors are serious about their attacks on the public/private distinction, then they would presumably reverse the principle articulated by the Seventh Circuit. Under a postmodern regime, city officials would have just as much right to remove a racially insensitive painting from the walls of the Chicago Art Institute as they would to enter a private home and take "offensive" art off its walls.

[167] MACKINNON, *supra* note 115, at 102.

[168] *See* MACKINNON, *supra* note 37, at 244 ("The first step [toward changing women's relation to the state] is to recognize that male forms of power over women are affirmatively embodied as individual rights in law. When men lose power, they feel they lose rights. Often they are not wrong.").

[169] MACKINNON, *supra* note 115, at 101.

[170] *Id.* at 102 (citation omitted).

to physically abuse another without risking legal recourse, including a severe prison sentence. Nor does the concept of privacy dictate that an individual—male or female—must descend into a limited and claustrophobic world completely isolated from supportive, kindred spirits. MacKinnon's argument is effective only against a desert-island sort of privacy, which is not the sort that typically exists in a modern society.

In a modern society, privacy encompasses not only the right of a person to go inside her home, shut the door, and never come out, but also the right to join together with other private individuals (that is, individuals who are not government agents) to militate against oppression fostered or permitted by the government. Thus, privacy (in the realistic sense of the term) actually is an essential ingredient in achieving social change, not a hindrance to it. Contrary to MacKinnon's assertions, privacy provides an essential locale where individuals—male and female—can develop their own "identity, autonomy, control and self-definition" without coercive interference from the government, which may have an interest in promoting vastly different ideas about the world. Assuming that government will tend to be controlled by forces unreceptive to fundamental social change (which is a fair assumption, since fundamental social change will often also involve replacement of the government itself), the preservation of privacy—including the right to generate and consume written, spoken and filmed messages without interference by the government—is the only way of ensuring that social change always remains a viable alternative.

The concept of privacy is merely one conceptualization of the basic democratic right to be distinctive—in thought, personality and lifestyle—from the norm set by mainstream society. Privacy is the realm into which those who are different from the norm can retreat in peace and safety. In one sense, MacKinnon's own career as a self-styled gender radical is a testament to the value of privacy and the notion of individual distinctiveness that privacy serves. She is allowed to develop her ideas in isolation from government control or oversight, collect material to support her thesis, and join together with others who share her views outside the presence of hostile ideological antagonists. MacKinnon does not hesitate to claim these benefits of privacy. Like many other objects of media attention, MacKinnon jealously guards her personal affairs from public scrutiny. When a reporter for the *New York Times* interviewed MacKinnon for a story several years ago, the reporter noted MacKinnon's "insistence on privacy in the few parts of her life that no interviewer could call

work-related."[171] Other press accounts have noted MacKinnon's refusal to debate feminists who disagree with her stance on pornography.[172] MacKinnon's assertion of her right to shield her private life from public scrutiny, and her unwillingness to take on her ideological adversaries in public is, despite her virulent theoretical claims to the contrary, an appeal to the concept of privacy. Systematic protection of privacy is simply a mechanism of guaranteeing to unknown and insignificant individuals at least some authority to dictate the terms of their dealings with the public, a power that prominent and influential individuals such as MacKinnon already exercise.

C. *The Civic Republican Attack on the Public/Private Distinction*

The starting point for the civic republican critique of the public/private distinction is the same as that of the feminist and critical race theorists' critiques. Like the feminist and critical race theorists, the civic republicans believe that "the private sphere is constituted by public decisions."[173] Their analysis of this premise leads the civic republicans to two conclusions about the public/private distinction, both of which are consistent with feminist and critical race theories on the subject.

The first conclusion is that authentic private values about social and political matters can be developed only through participation in a collective public dialogue. Thus, the function of politics in a civic republican system "is to select values . . . or to provide opportunities for preference formation rather than simply to implement existing desires"[174] Private preferences formed without the guidance of an appropriate public dialogue are viewed as "interests as subjectively perceived" rather than "actual interests,"[175] because unguided individual preferences are simply "a function of current information, consumption patterns, legal rules, and general social pressures."[176]

---

[171] Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES, Oct. 6, 1991 (Magazine), at 29.

[172] According to MacKinnon, participating in such a debate would play into a "pimp strategy to hide behind feminist women." David Margolick, *At the Bar: Catering to a Feminist Superstar, Judges Find Themselves Tangled in a Free-Speech Debate*, N.Y. TIMES, Nov. 5, 1993, at B11.

[173] Sunstein, *supra* note 52, at 1569.

[174] *Id.* at 1545 (footnote omitted).

[175] Sunstein, *supra* note 62, at 1171.

[176] Sunstein, *supra* note 63, at 10.

The civic republicans' second conclusion is that the protection of privacy (in the form of individual autonomy in the formulation of values and preferences) for its own sake is inadvisable because such protection will tend to reinforce unreflective and distorted collective influences. Indeed, since "purely private preferences" are merely "social constructs,"[177] in a significant sense the civic republicans believe that there is no such thing as a truly "private" realm. "On the republican point of view," Sunstein asserts, "the existence of realms of private autonomy must be justified in public terms."[178] In other words, civic republicans acknowledge the legitimacy of privacy claims only when such claims reflect the public goals set by the society as a whole through its government.

Civic republicans do not view their subordination of the private realm to the public realm as a threat to individual freedom. According to civic republicans, efforts to protect privacy will often fail to further the goal of individual freedom because, in the end, these efforts will merely protect one set of collective values (i.e., the values cultivated by self-interested collective forces outside the government) from another (i.e., the public-spirited values cultivated by a benign government). Under this view, protection of privacy can actually be harmful to both the individual and society as a whole because such protection inevitably will favor those who dominate the marketplace that dictates individual preferences. A central theme running through the civic republican literature is the need to employ affirmative government action to counteract marketplace distortions of this sort. In a nutshell, "the nature and extent of . . . malfunctions [in the private sector] will support considerable legislative and judicial intrusion into private preference structures."[179]

In applying these conclusions to the regulation of speech, Sunstein has attempted to link the civic republican attack on autonomy in the civil liberties context to the modern Supreme Court's renunciation of free market economics in the economic regulation context. This argument is based on Sunstein's interpretation of *Lochner v. New York*[180] and of the subsequent cases which overruled that decision's constitutional protection of laissez faire economic theory.[181] Sunstein argues that, in overruling *Lochner*,

---

[177] Sunstein, *supra* note 62, at 1133.
[178] Sunstein, *supra* note 52, at 1551.
[179] Sunstein, *supra* note 62, at 1172.
[180] 198 U.S. 45 (1905).
[181] *See* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 876-83 (1987)

the Supreme Court did not merely disavow the *Lochner* Court's constitutional enshrinement of neoclassical economics; nor did the Court adopt Holmes's judicial-restraint axiom that the United States Constitution "is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire."[182] Rather, according to Sunstein, when the Court overruled *Lochner*, it adopted the view that the Constitution does not require the government to remain neutral toward activities in the private sector, a view that greatly expands the scope of justifiable government intrusion into private affairs.[183]

According to Sunstein, the now-disavowed *Lochner* approach to constitutional law represents "not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law."[184] Thus, when the *Lochner* Court struck down New York's statutory prohibition of sixty-hour work weeks in the bakery industry, the Court assumed that the existing private market was "natural and inviolate," that government intervention to aid the disadvantaged bakery workers constituted "impermissible partisanship," and that government neutrality toward existing patterns of wealth was necessary to maintain proper government neutrality toward the private affairs of its citizens.[185] Sunstein argues that, by overruling *Lochner*, the Court abandoned both the requirement of government neutrality and the protection of the private status quo that government neutrality inevitably entails.[186] In Sunstein's view, the post-*Lochner* Court recognized that *Lochner*'s assumptions about a "natural" and "apolitical" economic reality were wrong. "We may . . . understand *Lochner* as a case that failed because it selected, as the baseline for constitutional analysis, a system that was state-created, hardly neutral, and without prepolitical status."[187] Sunstein argues that the common law system of private entitlements used by the *Lochner* Court as a baseline was itself the product of legal rules

---

(discussing *Lochner* and West Coast Hotel v. Parrish, 300 U.S. 379 (1937)).

[182] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[183] *See* Sunstein, *supra* note 181, at 880-83 (interpreting the Court's disavowal of *Lochner* as a realization that "neutrality is a function of the baseline against which government action is measured").

[184] *Id.* at 875.

[185] *Id.* at 882.

[186] *See id.* at 880-81.

[187] *Id.* at 882.

embodying public, political values. Likewise, by rejecting *Lochner*, the Court recognized that the Constitution does not prohibit the government from replacing preexisting common law rules favoring the interests of private parties with new rules embodying different public values that more directly serve the political interests controlling the government.

Insofar as Sunstein limits his analysis to the precise area of law governed by *Lochner* and the decisions superseding *Lochner*—i.e., government regulation of economic affairs—Sunstein's analysis is relatively uncontroversial. But Sunstein applies his analysis far afield of economic affairs, arguing that "[n]umerous [noneconomic constitutional] decisions depend in whole or in part on common law baselines or understandings of inaction and neutrality that owe their origin to *Lochner*-like understandings."[188] In particular, Sunstein cites several aspects of First Amendment law as reflecting "*Lochner*-like understandings." In an early article on the subject, Sunstein focused primarily on First Amendment limits on campaign finance regulation, arguing that *Buckley v. Valeo*[189] "is a direct heir to *Lochner*."[190] Sunstein specifically criticized the *Buckley* Court for asserting that "'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'"[191] According to Sunstein, this statement from *Buckley* reflected the Court's "*Lochner*-like understanding" that "[a]s far as the [F]irst [A]mendment is concerned, the state must take disparities in wealth, and the existence of some with more 'voice' than others, as part of nature for which government bears no responsibility."[192] Sunstein disagrees with this approach and would instead apply what he considers the appropriate post-*Lochner* attitude generally favoring direct public regulation of all private marketplaces, including the marketplace of political campaigns.[193]

In his early treatment of the subject, Sunstein recognized that the wholesale application of what he calls "post-*Lochner* principles" would effectively nullify the First Amendment by making virtually all private speech subject to public control by the government. As Sunstein

---

[188] *Id.* at 875.

[189] 424 U.S. 1 (1976).

[190] Sunstein, *supra* note 181, at 884.

[191] *Id.* (quoting *Buckley*, 424 U.S. at 48-49).

[192] *Id.*

[193] *See id.* at 914-15 (arguing that *Buckley* was wrongly decided but noting the potential pitfalls of government regulation of speech in political campaigns).

notes, such an approach would "wreak havoc with existing [F]irst [A]mendment doctrine,"[194] and would specifically obligate the Court to permit direct government regulation of both the content and viewpoint of speech. In his early discussions of the subject, Sunstein noted that the argument against the broad application to speech of post-*Lochner* regulatory principles rests on a recognition that "[t]he problem of deciding who is powerful and who is not is too manipulable and too likely to be skewed by impermissible factors to be the basis for [F]irst [A]mendment doctrine."[195] Thus, Sunstein concluded his early discussion of the issue by asserting modestly that while *Buckley* should be overruled, "the principle at issue there might be confined to financial expenditures without endangering the general principle of viewpoint neutrality."[196]

After having a few years to reflect on this conclusion, Sunstein seems to have decided that his early proposal for reforming First Amendment doctrine was far too moderate. In his more recent discussions of the application of *Lochner*-like understandings to First Amendment jurisprudence, Sunstein goes far beyond the narrow recommendation that *Buckley* be overruled and argues instead that the entire structure of First Amendment law should be revamped to reflect the post-*Lochner* principles he favors.[197] Since his earlier work on the subject, Sunstein discovered that "something important

---

[194] *Id.* at 914.

[195] *Id.* at 914-15.

[196] *Id.* at 915.

[197] This brings Sunstein's proposals into line with the similarly radical recommendations of Owen Fiss, whose position on the public regulation of antisocial private speech also purports to bring First Amendment doctrine into line with the principles of the post-*Lochner* constitutional era. According to Fiss, the First Amendment "has long served as the breeding ground of libertarian sentiment." Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 782 (1987). Fiss's description of his approach to this area of law also fits Sunstein:

> As part of the contemporary assault on state activism that so dominates our politics, Ronald Coase and Aaron Director have confronted New Deal liberals with the free speech tradition in order to remind them of the virtues of laissez faire and to build a case against state intervention in economic matters. My inclination is, of course, just the reverse. It occurred to me that if Coase and Director can celebrate the libertarian element in the free speech tradition as a way of arguing against state intervention in the economic sphere, we should be able to start at the other end—to begin with the fact of state intervention in economic matters, and then use that historical experience to understand why the state might have a role to play in furthering free speech values.

Id. at 783 (citation omitted).

and strange has happened to the First Amendment."[198] Specifically, the First Amendment has been appropriated by numerous individuals and groups whose speech, in Sunstein's view, does not deserve much, if any, constitutional protection.[199] These social outlaws were allowed to appropriate the First Amendment, according to Sunstein, because modern First Amendment theory developed around notions of government neutrality toward private affairs that are directly traceable to the Supreme Court's pre-*Lochner* understandings of reality. "For purposes of speech, contemporary understandings of neutrality and partisanship, or government action and inaction, are identical to those that predate the New Deal."[200]

Thus, Sunstein casts doubt upon the entire edifice of First Amendment law, rather than just the narrow area covered by *Buckley*. He proposes a "New Deal with respect to speech,"[201] which would bring First Amendment law into line with post-*Lochner* constitutional theory in other areas. It would also bring free speech doctrine into line with the overarching civic republican presupposition that the private realm should be directly controlled by the public realm. This "New Deal" therefore would greatly reduce the requirement of government neutrality toward private speech by limiting strong free speech protection to a narrow category of political speech.[202] In

---

[198] Sunstein, *supra* note 83, at 258.

[199] Sunstein's list of new, undeserving free speech claimants is a long one:

> Whereas the principal First Amendment suits were brought, in the 1940s, 1950s, and 1960s, by political protesters and dissidents, many of the current debates involve complaints by commercial advertisers, companies objecting to the securities laws, pornographers, businesses selling prerecorded statements of celebrities via '900' numbers, people seeking to spend large amounts of money on elections, industries attempting to export technology to unfriendly nations, newspapers disclosing names of rape victims, and large broadcasters resisting government efforts to promote diversity in the media.

Id.

[200] *Id.* at 266-67.

[201] *Id.* at 262.

[202] For Sunstein's proposal to limit free speech protection to a "core" area of political speech, see Sunstein, *supra* note 83, at 301-12. For an earlier version of the argument, see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 622. Although he is unlikely to invite the comparison, Sunstein's proposal is similar to one made several years ago by Robert Bork, who argued that the First Amendment should only protect speech concerning "'the discovery and spread of political truth.'" Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). According to Bork, "[a]ll other forms of speech raise only issues of human gratification," and should therefore be subject to government regulation along with all other means of expressing or satisfying human desires. *Id.* Bork and Sunstein even define the "core" political speech category in very similar

general, Sunstein proposes a broad new theory justifying widespread government intervention to restrict private speech. According to Sunstein, "in some circumstances, what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgement [of free speech] at all."[203] Or, in a more Orwellian formulation of the same notion, restriction equals freedom.

---

terms. Bork defines political speech as including "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country." *Id.* at 29. Similarly, Sunstein "will treat speech as political when it is both intended and received as a contribution to public deliberation about some issue." Sunstein, *supra* note 83, at 304 (emphasis omitted from original).

The main difference between Bork's and Sunstein's proposals is that Bork is much more forthright about the implications of this First Amendment model. According to Bork, "constitutionally, art and pornography are on a par with industry and smoke pollution." Bork, *supra*, at 29. Sunstein tries to evade this obvious consequence of limiting the First Amendment to political speech, by granting some protection to nonpolitical speech, and by manipulating his definition of "political speech." Neither of these evasions are reassuring. First, Sunstein states that nonpolitical speech would be subject to regulation "when government can show a good reason and a solid connection between the means of regulation and the reason in question," which would hardly be a difficult standard for the government to meet. Sunstein, *supra* note 83, at 310. Second, when Sunstein tries to avoid acknowledging that his standard (like Bork's) would permit the censorship of controversial artwork, he is forced to argue that "[w]hen government seeks to censor art or literature, it is almost always because of the political content, making the censorship impermissible." *Id.* at 312. But this reasoning is implausible when applied to work such as Robert Mapplethorpe's, which is concerned primarily with sexual and aesthetic matters. These concerns obviously have a great many political implications, but Mapplethorpe's conception of them does not easily fit within Sunstein's narrow conception of politics as "public deliberation about some issue." *Id.* at 304.

Sunstein is faced with the same dilemma that plagued Alexander Meiklejohn's similar theory almost fifty years ago. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 20-28 (1960) (reprinting Meiklejohn's 1948 book, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)) (noting that there is a huge discrepancy between First Amendment language which guarantees free speech and acts of the legislature which seek to regulate it). Like Meiklejohn, Sunstein must deal with the unavoidable problems created by closely linking First Amendment theory to political deliberation. On one hand, such a theory will leave outside the First Amendment a great deal of important speech; on the other hand, manipulation of the notion of "politics" to salvage constitutional protection for intuitively valuable speech merely corrupts the theory and makes it intellectually incoherent. Like his theoretical precursors, Sunstein must honestly acknowledge (and endorse) the repressive implications of his theory, or he must abandon the theory as unacceptable in a society that values open discussion of all human concerns, regardless of whether they can be narrowly construed as "political."

[203] Sunstein, *supra* note 83, at 267.

1. The Details of the Civic Republican Attack: Media Regulation in the Civic Republican State

Sunstein's extensive discussion of media regulation illustrates how his "New Deal" for speech would apply outside the campaign finance area. Although he spends most of his time discussing the traditional area of radio and television regulation, Sunstein expands the significance of this area of law by applying the same regulatory principles to newspapers.[204] Sunstein's discussion of media regulation is revealing because it demonstrates the magnitude of the change in existing doctrine that his theory entails, and also because it reveals Sunstein's deep distrust of a system in which ordinary citizens are permitted to formulate values and opinions without the direct and constant guidance of a supposedly benevolent government.

Sunstein expressly acknowledges that his version of the "New Deal" for speech would replace neutrality—which entails the protection of individual privacy and intellectual autonomy—with paternalism—which entails a substantial measure of governmental intrusion into individual thought and action. Although Sunstein tries to keep the analysis on the higher plane of theory and abstract doctrine, much of what he says about the media and its effects conveys the impression that Sunstein believes the "New Deal" for speech is necessary because he is dissatisfied with the decisions his fellow citizens have made under the present system, which has given them too much freedom to think for themselves.

One example of Sunstein's dissatisfaction can be found in his discussion of television news programming. Sunstein's "New Deal"

---

[204] Sunstein's rationale for extending content regulation to newspapers seems to rest on the fact that newspapers use the law to protect their property rights.

> It follows that insofar as newspapers invoke the civil and criminal law to prevent people from reaching the public, we might be able to regulate them, in a viewpoint-neutral way, without abridging the freedom of speech. If the government seeks to promote quality and diversity in the newspapers, courts should uphold mild regulatory efforts, especially in view of the fact that many newspapers operate as de facto monopolies.

Id. at 294 (footnote omitted). The omitted footnote to this passage notes that "[t]his claim casts doubt on the outcome, or at least the rationale, in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974)," which struck down, as a violation of the First Amendment, the application of broadcast-style equal-time requirements to newspapers. Sunstein's phrasing of this principle indicates that a newspaper's monopoly status is only a supplemental, not the primary, factor in his analysis. This suggests that he might also extend the principle beyond newspapers to other print media outlets, such as news magazines and magazines of opinion.

envisions broad new government regulation of such programming that "might include a compulsory hour of public affairs programming per evening, rights of reply, . . . or guidelines to encourage attention to public issues and diversity of view."[205] Sunstein also suggests the possibility of government mandated subsidies from private broadcasters to public broadcasters or commercial stations that agree to provide what the government deems to be "less profitable high quality programming."[206] As these broad proposals indicate, Sunstein sees little to like in the existing system of television news programming. Sunstein criticizes local television news for devoting very little time to what he calls "genuine news."[207] When the local stations do broadcast news, Sunstein complains, "the news stories tend to focus on fires, accidents, and crimes instead of issues of government and policy."[208] He criticizes network news on similar grounds. In particular, Sunstein objects to recent network coverage of political campaigns that focused on "'horse-race' issues—who was winning, who had momentum"—rather than on the candidates' speeches and other discussions of the issues.[209] Sunstein also decries the increase in nonpolitical stories on network news programs, noting that the percentage of time devoted to arts and entertainment news has increased substantially in recent years, while political news has diminished.[210] He quotes an industry executive who attributes the shift in network news emphasis to "the necessity of shrinking ratings."[211]

This last quote poses a dilemma for Sunstein, because it indicates that the programming choices of television broadcasters are not the real problem. The real problem is the bad taste of television viewers. The media perceives that viewers do not want to watch what Sunstein defines as "good" programming. Thus, by Sunstein's own evidence, there is no indication of a market failure in the broadcasting industry of the sort evident in *Lochner* and its progeny.[212] The market is not

---

[205] Sunstein, *supra* note 83, at 289.

[206] *Id.*

[207] *Id.* at 280.

[208] *Id.* at 281.

[209] *Id.*

[210] *Id.* at 281-82.

[211] *Id.* at 282 (quoting J. Max Robins, *Nets' Newscasts Increase Coverage of Entertainment*, VARIETY, July 18, 1990, at 3).

[212] One of the problems with Sunstein's application of post-*Lochner* paradigms to First Amendment jurisprudence is that he subtly misreads what the Supreme Court did when it overruled *Lochner*. Sunstein reads the renunciation of *Lochner* as the Court's approval of governmental paternalism in the form of social welfare legislation.

See Sunstein, *supra* note 181, at 879-80. According to Sunstein's view, the government is (and should be) separated to some extent from both employers and workers, in order to create a legal landscape in which the "common good" can be pursued without favoring one set of interests over the other. This conception is derived from the traditional civic republican disavowal of pluralist politics in favor of a more "universalist" model. *See* Sunstein, *supra* note 52, at 1554; Sunstein, *supra* note 57, at 31-32. I suggest that a pluralist interpretation provides a more accurate portrayal of the actual effects of the decisions overruling *Lochner*. Under this interpretation, the decisions overruling *Lochner* made the government the direct agent of a politically active working class representing its own interests by exercising political power. Thus, the defining characteristic of government in the post-*Lochner* period (in the area of economic regulation, anyway) is not paternalism, but self-interest. In the simplest sense, the absence of judicially enforced substantive due process restrictions in the post-*Lochner* era means that in the economic regulation context the political majority can do whatever is necessary to further its own self-interest through government action.

From a pluralist perspective, when the Supreme Court overruled *Lochner*, the Court specifically permitted the government to align itself with its most powerful constituents at any given time. According to this view, the primary logical flaw in the Supreme Court's *Lochner* opinion was the Court's assertion that the government was interfering with the economic liberty of workers by imposing limits on the number of hours they could work daily and weekly. *See* Lochner v. New York, 198 U.S. 45, 61 (1905). Contrary to the Court's contention, it is more plausible to assume that workers in the bakery industry would prefer to work the shorter, healthier hours dictated in the *Lochner* legislation. These preferences were thwarted because the *Lochner* decision prevented the government from enforcing the legislative product of concerted political action by the workers. In the absence of government action on their behalf, the workers were at the behest of employers, who had the economic clout to set the terms of employment without regard to the workers' preferences or needs. Read in this way, worker-protection legislation was simply a political counterbalance to the economic power asserted by the employers. Without this counterbalance, the workers lost their ability to compete in the marketplace on roughly equal terms as their employers. Thus, *Lochner* skewed the market, not because it prevented the government from acting on behalf of generalized public values, as Sunstein argues, *see* Sunstein, *supra* note 181, at 877-78, but because *Lochner* prevented the government from acting on behalf of a very specific set of private interests—i.e., the interests of the workers. This interpretation is consistent with the language in later cases overruling *Lochner* principles as applied to other economic welfare legislation. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937) (upholding minimum wage law and finding that "[t]he legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances").

According to the pluralist explanation of the post-*Lochner* era, the crucial difference between the economic cases and the speech cases is that in economic legislation the government does not assert the ability to discern the "true" wishes of workers who had not yet realized their own self-interest. Rather, the government acts on behalf of workers who exercise their political clout in the pursuit of very specific goals. Thus, Sunstein is wrong about the significance of paternalism in the constitutional doctrine abandoning the *Lochner* paradigm, and he is also wrong to suggest that an almost purely majoritarian constitutional model, which now governs

failing to provide what the viewers want; rather, the successful broadcast outlets provide large numbers of viewers with precisely the kind of programming they desire. Nevertheless, Sunstein argues that the government should intervene in the news business anyway. According to Sunstein, although the viewers seem to be getting what they want, in reality the viewers do not know what they want; that is, they do not know what they *really* want. The viewers may think they want "Beavis and Butthead," but they *really* want "Washington Week in Review."

How does Sunstein know this? Because he has somehow determined that the people demanding "Entertainment Tonight" have been subtly duped into adopting this preference by something called the "broadcast status quo." According to Sunstein:

> [P]rivate broadcasting selections are a product of preferences that are themselves a result of the broadcasting status quo, and not independent of it. In a world that provides the existing fare, it would be unsurprising if people generally preferred to see what they are accustomed to seeing. They have not been provided with the opportunities of a better system. When this is so, the broadcasting status quo cannot, without circularity, be justified by reference to the preferences. Preferences that have adapted to an objectionable system cannot justify that system.[213]

Sunstein concludes that governmental intrusion into this aspect of the private speech market is justified because "the inclusion of better options, through new law, does not displace a freely produced desire."[214]

Aside from the problems inherent in determining what is a "freely produced desire," Sunstein's proposal is inconsistent with his own evidence in at least three ways. First, Sunstein introduces his discussion by noting that the television news business has changed substantially over the last several decades.[215] This observation is inconsistent with his conclusion that the public's pervasively unhealthy television viewing habits have been produced by exposure to a preexisting "broadcasting status quo," which is dedicated to training television viewers to prefer "bad" entertainment program-

---

the economic regulation area, can be applied without significant modification to a clearly countermajoritarian constitutional area such as the First Amendment. For a detailed argument on this point, *see infra* notes 232-41 and accompanying text.

[213] Sunstein, *supra* note 83, at 288 (citation omitted).

[214] *Id.*

[215] *See id.* at 285 ("It might be suggested that in an era of cable television, the relevant problems disappear. People can always change the channel.").

ming over "good" public affairs programming. Second, to the extent that the trend in television news content has moved toward entertainment programming and away from traditional news, Sunstein's own source attributes this change to declining ratings for traditional news broadcasts.[216] If this is true, then the "broadcasting status quo" seems to have responded to the deteriorating desires of the public, not the other way around. Third, as Sunstein himself acknowledges, "better options" are already included among the choices offered to the public on the existing menu of television programming, in the form of public television, which in Sunstein's own words, "offers a wide range of high quality fare."[217]

So if "good" television programming choices are already available, why is increased government regulation of private broadcasting necessary? Because most of the public has used its existing freedom to reject or ignore Sunstein's favored programming in favor of other, less enlightening alternatives. Thus, since freedom has not increased the public's appetite for quality television programming, it is necessary to remove some of that freedom by forcing an increased diet of "good" programming on a public that does not want it. As Sunstein puts it, "[i]f better options are put more regularly in view, we might well expect that at least some people would be educated as a result, and be more favorably disposed toward programming dealing with public issues in a serious way."[218] In short, Sunstein proposes a system of telepolitical reeducation.

The declining quality of television viewing habits is, in itself, hardly the most pressing issue in First Amendment jurisprudence. But, as noted above, Sunstein suggests that the regulatory logic he applies to the broadcast industry is also applicable to other areas of speech.[219] Also, this discussion of the relatively trivial subject of broadcast regulation illustrates the recurring themes of Sunstein's

---

[216] *See supra* note 211 and accompanying text.

[217] Sunstein, *supra* note 83, at 289-90.

[218] *Id.* at 288.

[219] *See supra* note 204 and accompanying text. Sunstein's logic on this score is quite expansive. For example, Sunstein notes that this logic might apply to newspapers as well as the broadcast industry because the newspapers' property rights "also amount to a legally-conferred power to exclude others. Simply as a matter of fact, that power is a creature of the state." Sunstein, *supra* note 83, at 276 (citation omitted). Of course, if nothing more than the assertion of property rights is enough to justify government regulation of speech, then every writer, editor, publisher and book store in the country is potentially subject to direct government intervention in the editorial process "to promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues." *Id.*

civic republicanism and other versions of postmodern censorship theory. Sunstein and the other postmodern speech theorists posit that individual autonomy is chimerical. Likewise, Sunstein and the other postmodern speech theorists assert that collective, public determinations of value are inevitably superior to individual, private determinations of value. This leads Sunstein, along with the other postmodern speech theorists, to conclude that individual privacy in the realm of speech (i.e., the private selection of what to say, read, listen to, and watch) should be subjected to far more government intervention and control than is permissible under modern First Amendment doctrine.

The postmodern proposals discussed in this section—i.e., the proposals to reduce the protection of individual privacy and autonomy in value formation by allowing the government to channel individual expressive choice—go to the very heart of both First Amendment and democratic theory. The civic republican attack on privacy is distinguished from other postmodern efforts only in that it purports to move beyond pure theory into the realm of constitutional doctrine. The civic republican case against privacy and autonomy asserts that those cornerstones of modern constitutional law can be attacked from within the present framework of constitutional law without reformulating existing doctrine. Thus, the civic republican case against the protection of privacy and autonomy in the area of expression depends almost entirely on the claim that intellectual markets can be analogized to commercial markets in products and commodities. If the government has constitutional authority to regulate one market, the argument goes, then the same constitutional rationale should support regulation of the other. Unfortunately, the attempt to couple an attack on intellectual autonomy with the Court's renunciation of *Lochnerian* economic autonomy suffers from many of the same flaws as the more purely theoretical postmodern attacks on privacy and autonomy. The next section briefly discusses three of the most prominent flaws in Sunstein's version of the civic republican attack on the public/private distinction.

D. *The Flaws in the Civic Republican Approach to the Public/Private Distinction*

Professor Sunstein's attempt to link *Lochner* and the strong protection of free speech is flawed in at least three major

respects.[220] First, Sunstein's account ignores the fundamental differences in the nature of governmental policies regulating economic activity and speech. Second, Sunstein mistakenly assumes that the distribution, application and effects of private collective power are the same in the area of speech as in the area of private economic activity. Third, Sunstein does not adequately address the problem of limiting the misuse of political power in a system that increases significantly the degree of governmental control over the private sphere.

1. The Different Characteristics of Economic and Speech Regulations

By analogizing the regulation of speech to the regulation of economic affairs, Sunstein implicitly asserts that the government's objectives in these two areas pose similar challenges to the principles of democratic self-governance. In Sunstein's view, "[f]or purposes of speech, contemporary understandings of neutrality and partisanship, or government action and inaction, are identical to those that predate the New Deal."[221] Thus, Sunstein would "abandon, or at least qualify,"[222] the basic principles governing the protection of free speech by applying "much of the reasoning of the New Deal attack on the common law to current questions of First Amendment law."[223] In particular, he asserts that although "[m]arkets are generally good things, both for ordinary products and for speech," private speech should be regulated "when the legal creation of a market has harmful consequences for free expression."[224] The key here is that the government should be allowed to decide when a particular pattern of speech threatens "harmful consequences for free expression,"[225] just as government should be allowed to decide that a particular pattern of ownership in the steel industry threatens harmful consequences for other industrial sectors of the economy.

Contrary to Sunstein's assertion, the regulation of products and the regulation of speech pose quite different problems for democratic self-governance. When the government regulates economic

---

[220] These criticisms would also apply to the very similar arguments of Owen Fiss. *See supra* note 197.

[221] Sunstein, *supra* note 83, at 266-67.

[222] *Id.* at 263.

[223] *Id.* at 262.

[224] *Id.* at 277.

[225] *Id.*

activity, it is focusing on a concrete problem with a series of practical implications. In the economic realm, the government may consider such questions as: Is a particular drug dangerous? Does a company's monopolization of one market sector lead to domestic price gouging, or is it necessary to achieve economic efficiencies in order to compete with global competitors? Does raising the minimum wage help young, untrained workers enter the marketplace, or does it tend to reduce entry-level job opportunities? Is one form of pollution control device more effective and reliable than another?

The nature of these problems ensures that government regulations will be constrained in many different ways. If the government bases an economic decision on inaccurate assumptions about the practical consequences of the regulatory action, those harmed by the policy will immediately identify the government's failures and insist that those failures be corrected. The interests involved will be concrete, and usually financial in nature. Thus, economic regulations will always be framed by the pragmatic limitations of the physical environment in which those regulations are implemented, and the equally practical constraints of economic efficiency and financial self-interest.

The interests involved in the economic regulation context are different in kind from the interests involved in the regulation of speech. The battle over any major economic regulation will usually entail a series of political compromises by all parties. It is unlikely that one ideological faction or economic interest group will enact its entire agenda into law, and also unlikely that one faction will completely fail to have its interests represented to some degree by legislation affecting it. Moreover, the rapidly shifting character of the modern economic landscape ensures that no economic policy will ever be viewed as permanent. All economic legislation is transitory, as are the private interests supporting that legislation. The recent legislative execution of the Interstate Commerce Commission—once a shining star of the regulatory state, and later a supine captive of the industries it supposedly controlled[226]—is a good example of how comprehensive and seemingly permanent economic regulatory schemes mutate over time and eventually die of natural economic and political causes.

---

[226] *See* David E. Sanger, *A U.S. Agency, Once Powerful, Is Dead at 108*, N.Y. TIMES, Jan. 1, 1996, at A1 (reciting a brief history of the major changes throughout the life of the ICC).

These factors—concreteness and a transitory nature—indicate that economic regulation is unlikely to undermine two of the basic characteristics of successful democratic government: the broad dispersion of political power and the temporary nature of all policy. In a democracy, all elected officials must be subject to removal from office when they lose the public's support, and all policies enacted by these officials must constantly be subject to radical revision or rescission. Political and social opposition to the status quo is permitted in a democracy because in a democratic political culture the status quo can never be permanently fixed, since any governing faction is presumptively impermanent.

Government regulation of private speech differs significantly in both purpose and effect from the government regulation of private economic affairs sketched above. In particular, the justifications for government regulation of private speech undermine the very characteristics of democratic policy that legitimate economic regulations—i.e., the dispersion of power and the impermanence of policy determinations. This difference between the two types of regulation is due largely to the fact that regulation of private speech is proposed as a mechanism for the much more comprehensive public control of private thoughts and values. Whereas economic regulations are inherently temporary and always subject to change based on the shifting alliances and interests of private citizens and their political representatives, speech regulations are proposed as a means of permanently altering the thought patterns of the citizens living under the control of the government. According to Sunstein, it is the role of the proper civic republican government to "instill principles of virtue."[227] The need to inculcate "virtue" in individual citizens is why "a democratic government should sometimes take private preferences as an object of regulation and control."[228]

Governmental efforts to control private preferences would be fruitless unless the "virtue" taught by the government took root and served as the basis for all the citizens' other political and social decisions and activities. Unlike the post-*Lochner* regulatory policies enacted during the New Deal, which were by definition pragmatically oriented and subject to significant change over time, Sunstein's system of civic republican government will succeed only if the governmental inculcation of "virtue" permanently alters the ideolo-

---

[227] Sunstein, *supra* note 57, at 32.
[228] Sunstein, *supra* note 63, at 13.

gical landscape. The very notion of "virtue" connotes a universal and permanent value.[229] Sunstein's own description of the civic republican conception of government "reflects a belief that debate and discussion help to reveal that some values are superior to others."[230] Therefore, once the civic republican system produces a definitive judgment about political or social values, further debate becomes unnecessary and even counterproductive (since further discussion may lead weaker members of the community to adopt values that the system has identified as inferior). At this point, civic republican theory requires the political community to abandon the democratic process of constant policy critique and evolution, in favor of a mechanism—i.e., censorship of antisocial speech—intended to squelch dissent and perpetuate the "superior" values already identified by the government.

Thus, there is a stark difference between government regulation of economics and government regulation of speech, a difference that is reflected in the current scheme of constitutional jurisprudence that Sunstein rejects. The present Supreme Court severely restrains government regulation of private speech because speech regulations are by nature "universalist" and permanent, and therefore deeply antidemocratic. Conversely, the Court gives the elected branches of government broad authority to regulate economic affairs because economic regulations are by nature pragmatically limited and assumed by all to be temporary and subject to constant critique and significant modification over time. Such regulations are therefore entirely consistent with democratic political assumptions, and do not require significant and continuing judicial oversight.[231]

2. Individual Autonomy and Collective Power in the Economic and Speech Regulation Contexts

The second reason the regulation of private economic and speech markets should receive different constitutional scrutiny is that individual autonomy and collective power manifest themselves in different ways in the areas of economic activity and expression. The civic republican position is that individual autonomy is affected by

---

[229] Sunstein himself notes the civic republicans' "belief in universalism" and their "reject[ion of] ethical relativism and skepticism." Sunstein, *supra* note 52, at 1554.

[230] Sunstein, *supra* note 57, at 31-32.

[231] For other arguments defending the asymmetrical treatment of economic and speech markets, which are consistent with the views expressed in the text, see Sullivan, *supra* note 27, at 959-65.

collective private power in much the same way in both economic and speech markets. In particular, Sunstein argues that individual autonomy is hampered whenever disparities in collective power are permitted to distort the private market in either the expression of ideas or the distribution of economic goods. Thus, according to Sunstein, in the market for speech, as in the market for commercial products, "[w]hen those disparities [in private power] are large, the principal goals of free speech will be subverted unless the government intervenes with corrective measures."[232]

This position is flawed because Sunstein misconstrues the political contexts in which economic and speech regulation occur. In Sunstein's view, the government serves as a sort of paterfamilias when it regulates either economic affairs or speech. Under this conception, the government's role in both contexts is overtly paternalistic: its role is to protect powerless individuals from assaults on their autonomy by private collective power. This paternalistic view of government is flawed with respect to both the speech and the economic regulation contexts.

Contrary to Sunstein's view, the government is not really acting as a paternalistic entity when it steps in to regulate commercial activity. A more accurate perspective on the government's role as economic regulator views the government as the agent of one collective economic entity (i.e., the group of individuals or organizations who will benefit from the regulation), in a competition for power with another (i.e., the group being regulated). The reasons why the first collective entity seeks to limit the second entity's activities are irrelevant. For purposes of constitutional analysis, the key point is that in the struggle over economic power and its regulation, both groups that are seeking the government's assistance are collective entities.

When viewed in this way, economic regulation by the government does not involve a conflict between individual autonomy and collective power at all, and the government is not—as Sunstein would have it—paternalistically stepping in to protect individuals from the excesses of private collective power. Rather, economic regulation occurs in a context defined by competing spheres of economic power which defend their collective interests by using very different strengths and tools. In the famous New Deal cases, the relevant collective interests were the large-scale economic forces of labor and

---

[232] Sunstein, *supra* note 202, at 622.

capital.[233] In later years, the government was used by other factions—including consumers, environmentalists and even racial minorities—to limit the power of collective private interests to employ capital in ways that harmed or disadvantaged the faction controlling the government. Again, the identity and interest of the faction using the government to do its bidding is irrelevant. The point is that in all these battles the government was not a disinterested, paternalistic entity rising above ideological conflict to protect "the common good" or "virtue" or even "individual autonomy." When the government steps in to regulate economic affairs, it does so on behalf of one economic faction and against another. When the government regulates economic affairs, it is simply an enforcer of one group's preexisting interests. That is, it enforces the interests of one set of powerful political actors against an antagonistic group of powerful economic actors.

Sunstein explains the Court's renunciation of *Lochner* in very abstract terms, as the Court's recognition that "the existing distribution of resources and opportunities" is not "prepolitical."[234] That may be true, but there is a more down-to-earth explanation of *Lochner*'s demise that comes closer to explaining the lack of serious opposition (either on or off the Court) to the Court's post-1937 abandonment of almost all judicially enforced constitutional limits on government regulation of economic affairs.[235] I submit that the

---

[233] *See* United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act, which governs wages and hours in industries producing goods for interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act, which governs collective bargaining in industries "affecting commerce"); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (overturning the Bituminous Coal Conservation Act, which governed wages, hours and working conditions in the coal mining industry).

[234] Sunstein, *supra* note 83, at 264.

[235] The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), does not indicate a radical shift in the Court's hands-off attitude toward economic legislation enacted under the Commerce Clause. The key premise of the *Lopez* decision is that the activity regulated in the Gun-Free School Zones Act was not commercial in nature, and therefore did not fall within the ambit of the Commerce Clause. *See id.* at 1630-31. Although this opinion clearly limits the scope of the national government's power over noncommercial activities (to an as-yet undetermined degree), and although the logic of the limitation is open to question, *see id.* at 1657-71 (Breyer, J., dissenting) (noting that Congress could have determined that violence in school zones would have an effect on the "quality of education" that would result in a less effective education system, and so although the presence of a single gun in a school might have nothing to do with interstate commerce, in the aggregate the presence of guns there might create such an effect if all educational standards were thereby reduced), *Lopez* does nothing to limit the federal government's

nearly complete lack of concern expressed in Supreme Court opinions since 1937 about the effects of allocating economic regulatory power to the elected branches of government stems from the Court's recognition that the basic principles of democracy are not threatened by a system that permits large concentrations of collective power to fight for advantage using all the natural tools at their disposal.

In the most basic sense, major disputes over the regulation of economic resources will almost always involve roughly the same alignment: on one side will be the owner of an economic resource, and on the other side will be some group that is potentially affected by the owner's intended use of that resource. The owner will have all the natural advantages that economic power brings—in essence, the ability to buy support by promising benefits to nonowners—and the group potentially affected will have the force of sheer numbers, which in a democracy gives it a natural advantage because it entitles it to gain control of the ultimate monopoly on coercive power represented by the government.

Under this interpretation, the Supreme Court's renunciation of *Lochner* was not about governmental paternalism, or the "public interest," or any other grand, benign justification for government action that attempts to place the government above the fray created by competition among economic factions within society. On the contrary, the Supreme Court's renunciation of *Lochner* allowed the government to serve as a direct participant in battles for primacy over the use of economic resources. In the post-*Lochner* era, the government has become the designated agent of whatever faction can muster the most political power through a democratic political process, on the implicit assumption that whatever power sheer numbers give to one faction will be counterbalanced by the influence naturally flowing from the deployment of financial resources by the economic elite.

Justice Holmes got it right in his *Lochner* dissent: In the economic context, "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."[236] Like everything else the government does,

---

regulatory authority over admittedly commercial activities, and does not restrict state regulatory authority at all. Therefore, *Lopez* does not augur a return to *Lochner*-style constitutional restrictions on the use of government power to regulate economic affairs.

[236] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

economic regulation is about the assertion of power, not the recognition of virtue or the identification of the "public interest."[237] Despite the cynical trappings of this theory, it provides much more direct support for the basic theory of democratic self-governance than the seemingly more idealistic view proposed by Sunstein. In Sunstein's view of a benign, paternalistic government pursuing the common good, the beneficiaries of government economic regulations are placed in the position of subservient but thankful drones who are taught by the government (through the government's careful inculcation of civic virtue) to appreciate their powerful protector. In the harsher, Holmesian view of government as a directly interested enforcer of one group's interests, the beneficiaries of government regulation must be viewed as the active agents of their own destinies, using all the power at their disposal to realize their desires and protect themselves from their economic adversaries.

If the government's role in regulating economic affairs in the post-*Lochner* era is viewed from the Holmesian rather than the civic republican perspective, then the flaws in Sunstein's view of the government's role in regulating speech become evident. Unlike economic regulation, which by definition involves battles between large-scale, well-organized collective forces, government regulation of speech continues to deal with a highly individualistic phenome-

---

[237] In one of his discussions of *Lochner*, Sunstein also quotes the Holmes passage concerning "the natural outcome of a dominant opinion," but only to disagree with Holmes's position as "an outgrowth of the very species of constitutional social Darwinism that it purports to reject." Sunstein, *supra* note 181, at 879-80. Of course, it is this same "social Darwinism" that led Holmes to protect free speech on the ground that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Sunstein correctly notes that Holmes's position (with which the arguments in the text are consistent) "treats the political process as an unprincipled struggle among self-interested groups for scarce social resources." Sunstein, *supra* note 181, at 880. Sunstein rejects this model of society, as well as other, similarly pluralist social theories in favor of a universalist model that "posit[s] the existence of a common good, to be found at the conclusion of a well-functioning deliberative process." Sunstein, *supra* note 52, at 1554. If Sunstein's perspective is accurate, then virtually all constitutional constraints on the government's enforcement of the "common good" seem unnecessary, or even socially harmful. *See* Gey, *supra* note 51, at 841-64. It is my position that the cynical but realistic perspective of Holmes provides (perhaps ironically) a much stronger theoretical basis for restraining the totalitarian inclinations of a powerful government than the well-intentioned but politically naive perfectionism of the civic republicans and other postmodern censors.

non, the nature of which has not changed since John Milton published the *Areopagitica* in 1644.

Today, as in 1644, the government's objective when it regulates speech is to control the thoughts of individuals by insulating those individuals from ideas that the government disfavors. Usually the immediate target of such regulation—the speaker, writer, singer, dancer, etc.—will also be an individual, rather than a collective or corporate entity. Even in situations where the government regulation targets a speaker that is collective in nature—i.e., speech involving collaborations by several authors, or speech sponsored or broadcast by a corporation—the audience will always be composed of individual citizens who must choose to adopt some ideas proposed by the speaker and reject others. Participants in the market for speech can "sell" their ideas only if individual listeners are willing to "buy" those ideas. Unlike the economic area, in which consumers are forced to buy and sell a certain number of products (housing, food, clothing) merely to stay alive, "consumers" of speech can take themselves entirely out of a particular market segment by refusing to "buy" any of the products being offered by any of the "sellers" participating in that segment.

In short, the speech market is different than the economic market: In the speech market, the individual is still a viable market participant, whereas in the economic market the individual is almost totally subservient to collective forces that are, in a very concrete sense, beyond the individual's control. In the economic market, the individual must join in collective action through the government (or unions, or some other mechanism for gaining collective leverage against collective economic interests) to assert control over his or her own life. Collective action is an unavoidable means of self-protection in the economic market. In the speech market, on the other hand, such collective self-protection is unnecessary; individuals can protect themselves sufficiently simply by exercising their own individual prerogative about what they hear, view, read or believe.

Sunstein's only response to this argument, versions of which appear throughout his work, is that the individual citizen has become just as irrelevant to the speech market as a nonunionized individual laborer has become in a large manufacturing industry. This theme is evident in Sunstein's discussion of broadcast regulation.[238] As this discussion indicates, Sunstein believes that private collective

[238] *See supra* notes 204-19 and accompanying text.

forces in the speech market have become such a powerful factor in society that individuals can no longer rely on their own individual judgment to effectively protect themselves against "bad" ideas.[239] Instead, individuals must now rely on the government to provide protection against ideas, in much the same way that the government protects them against salmonella in raw chickens.

The simple answer to this argument is that it is fundamentally at odds with the basic precepts of democracy itself. If individual judgments have become so tainted by the speech of collective entities that the individual cannot even be trusted to decide which television shows to watch,[240] then those same individuals certainly should not be trusted to elect officials to run the most powerful country in the world. By the same token, if Sunstein's view of corrupted popular opinion is correct, then the government should feel no particular obligation to respect popular opinion about complicated matters of social and economic policy, since popular opinions on such subjects are probably skewed by the influence of collective forces intentionally manipulating public opinion in ways that disserve the common good.

---

[239] The previous section discusses Sunstein's views on the ominous and powerful "broadcast status quo." *See supra* notes 213-19 and accompanying text. Owen Fiss provides his own colorful rendition of this fearful beast:

> [T]he power of an agency, like the FCC, is no greater than that of CBS. Terror comes in many forms. The powers of the FCC and CBS differ, one regulates while the other edits, but there is no reason for believing that one kind of power will be more inhibiting or limiting of public debate than the other.

Fiss, *supra* note 197, at 787. The notion that any media outlet could ever be as powerful a force in society as a government that controls the application of all criminal and civil sanctions is dubious even in the abstract. In light of events in the real world, the notion that CBS is a powerful embodiment of "terror" is laughable. In one news article describing the recent purchase of CBS by the Westinghouse Electric Corporation, the New York Times noted that "what [Westinghouse is] getting for its money is a massive, ramshackle fixer-upper." Bill Carter, *In Buying CBS Westinghouse Takes On a Fixer-Upper*, N.Y. TIMES, Oct. 30, 1995, at D1. The people who run networks are much more realistic than law professors about the networks' present and future potential for instilling "terror" in large portions of the population. In 1990, NBC president Robert Wright told an interviewer that

> the networks, which now attract a little less than 60 percent of the potential audience—and less than 50 percent in major markets—may see the overall percentage drift "down into the upper 30s before we're finished. It's a function of how aggressive the cable networks want to be in terms of programming breadth. If they don't want to compete too much, then we ought to be able to hang in there somewhere in the upper 30s—I think."

Washington Whispers, U.S. NEWS & WORLD REPORT, July 2, 1990, at 17 (Charles Fenyvesi ed.).

[240] *See supra* notes 204-19 and accompanying text.

This conclusion is bolstered by the common perception that individual opinions about politics and social issues are developed very haphazardly by most people, and are seldom generated by the carefully constructed process of "virtuous" civic republican deliberation that Sunstein would prefer. But if (i) the people cannot be trusted to vote, (ii) their opinions about public matters are haphazardly defined and probably tainted anyway, and (iii) these factors mean that the government may essentially ignore popular opinion until the public has been retrained through the collective inculcation of "virtue," then Sunstein's arguments seem to propose that we should move beyond democratic politics into a political system completely incompatible with the basic premises of the Constitution.

Sunstein would undoubtedly deny that he is antidemocracy, and in fact much that he has written is specifically focused on the goal of increasing public participation in governmental affairs. But if this is his goal, then he must abandon the claim that the government has a role in "teaching virtue" to its citizens or in controlling the ideas that those citizens speak or hear. For better or worse, the *sine qua non* of democracy is still government by the people, flawed though the people may be. There is simply no place in a *truly* democratic regime for Sunstein's notion that "a democratic government should sometimes take private preferences as an object of regulation and control."[241]

3. The Special Danger of Government Overreaching in Speech Regulation

One of the central themes that distinguishes all postmodern censorship doctrines from more speech-protective perspectives on the First Amendment is the postmodernists' relative nonchalance about the possibility of government overreaching in the regulation of speech. On this score, Sunstein at least gives occasional lip-service to the fear of government overreaching.[242] Although he argues that post-*Lochner* constitutional analysis should be extended to the First Amendment, at least he does not propose relegating speech to

---

[241] Sunstein, *supra* note 63, at 13.

[242] Typically, Sunstein raises these concerns only to explain them away with regard to a particular type of especially dangerous or harmful speech. *See, e.g.*, Sunstein, *supra* note 202, at 626 ("In the [F]irst [A]mendment setting, fears about difficult intermediate cases and misapplication are generally salutary. But at least in the context of pornography, they have proved a barrier to legislation that would in all likelihood do more good than harm.").

the constitutional wasteland of rational-relationship analysis that is now applied to economic regulations.[243] Sunstein's proposals, however, reduce significantly the protection for speech that fails to meet his test of "whether the speech is a contribution to social deliberation,"[244] and the remaining protections for "low-level speech" would evaporate altogether if the government "can show a good reason and a solid connection between the means of regulation and the reason in question."[245] Thus, despite his periodic protestations to the contrary, Sunstein shares the general postmodern confidence that the government should be trusted to make sensitive decisions about censoring antisocial speech.

As is probably obvious by this point, the subtext of this Article is that such blind trust of government censors is wholly unwarranted. The most telling cause for skepticism of Sunstein's trusting attitude is that case reporters are filled with hundreds, if not thousands, of opinions illustrating how badly governments can misjudge the value and potential danger of antisocial speech. In the political speech category, we have examples ranging from the early Espionage Act cases[246] to the Pentagon Papers decision in the Vietnam era.[247] In the area of social and artistic speech (which is where Sunstein would greatly increase the government's power to dictate "virtue" by regulating private expression), we have embarrassing episodes involving the successful suppression of novels such as *God's Little Acre*[248] and *An American Tragedy*[249] in the early-to-mid-twentieth century. More recent, and perhaps equally embarrassing, are the government's somewhat less successful efforts to suppress works such as Robert Mapplethorpe's photographs,[250] 2 Live Crew's music,[251]

---

[243] *See* Sunstein, *supra* note 83, at 267.

[244] *Id.* at 309.

[245] *Id.* at 310.

[246] *See* Abrams v. United States, 250 U.S. 616 (1919) (affirming a conviction under the Act for engaging in antiwar speech); Debs v. United States, 249 U.S. 211 (1919) (same); Frohwerk v. United States, 249 U.S. 204 (1919) (affirming a conviction under the Act for distribution of antidraft literature); Schenck v. United States, 249 U.S. 47 (1919) (same).

[247] *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (reversing the Second Circuit's approval of an injunction against the publication of the "Pentagon Papers").

[248] *See* Attorney Gen. v. Book Named "God's Little Acre," 93 N.E.2d 819 (Mass. 1950) (upholding an obscenity conviction for the sale of the book).

[249] *See* Commonwealth v. Friede, 171 N.E. 472, 474 (Mass. 1930) (upholding an obscenity conviction for the sale of Dreiser's novel, "even assuming great literary excellence, artistic worth and an impelling moral lesson in the story").

[250] *See* Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity*

and the painting of a Chicago Art Institute student who had the audacity to parody the mayor of Chicago.[252] This list, to put it mildly, is not comprehensive.

Sunstein undoubtedly would argue that he does not endorse any of these government actions to suppress valuable speech. Indeed, he specifically argues that the work of Robert Mapplethorpe should be protected because it "has the characteristics of social commentary."[253] According to Sunstein, Mapplethorpe's work "attempts to draw into question current sexual norms and practices, and . . . bears on such issues as the right to privacy and the antidiscrimination principle."[254] This is comforting but confusing, since precisely the same thing can be said about pornography, the regulation of which Sunstein has advocated for many years.[255] For purposes of determining the legitimacy of government suppression, how do we distinguish between two sexually explicit expressive works that each call into question current sexual norms? We do not. Under Sunstein's system, we let the government do it—except that Sunstein seems to believe that the government officials in Cincinnati got it wrong. Then again, given the vagueness of Sunstein's standard (exactly what constitutes "social commentary," anyway?) and his deferential attitude toward the government inculcation of values, is it not possible that under the Sunstein standard, Cincinnati got the Mapplethorpe issue right and Sunstein got it wrong?

The reason why neither Cincinnati nor Sunstein can be deemed "right" about the value of Mapplethorpe's work is that such a

---

Case, N.Y. TIMES, Oct. 6, 1990, at A1.

[251] *See* Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir.), *cert. denied*, 506 U.S. 1022 (1992). The Court of Appeals reversed the district court's ruling that the album "As Nasty As They Wanna Be" was obscene, based in part on the district judge's finding that although most music "is sufficiently subjective that reasonable persons could disagree as to its meaning[,] . . . music of the 'rap' genre focuses upon verbal messages accentuated by a strong beat. It is an appeal to 'dirty' thoughts and the loins, not to the intellect and the mind." Skywalker Records, Inc. v. Navarro, 739 F. Supp 578, 591 (S.D. Fla. 1990).

[252] *See* Nelson v. Streeter, 16 F.3d 145 (7th Cir. 1994) (upholding lower court decision that city aldermen who removed a student's painting of a former mayor wearing women's underwear were not entitled to official immunity from an action for a civil rights violation).

[253] Sunstein, *supra* note 83, at 308.

[254] *Id.*

[255] *See, e.g.*, Sunstein, *supra* note 83, at 309 ("[T]he question is whether the speech is a contribution to social deliberation, not whether it has political effects or sources. Thus, for example, there is a distinction between a misogynist tract, which is entitled to full protection, and pornographic movies. . . ."); Sunstein, *supra* note 202, at 591-602 (discussing the harms of pornography).

conclusion depends on determinations concerning social, aesthetic, and moral values about which citizens of a democracy may legitimately disagree. This is why a system affording the government greater deference to gauge the value of speech is so dangerous. Such a system will always dissolve into a raw power-grab by factions seeking to control the government and its ability (authorized and encouraged under the civic republican system) to inculcate values in the citizenry. This power-grab will, in turn, generate a great deal of self-serving intellectual sleight-of-hand concerning what is considered "social commentary," "political" or—once we permit government to regulate speech on the basis of moral or social harms— a "harm"[256]

In his discussion of broadcast regulation, Sunstein sums up his general approach to the subject of government regulation of private speech by noting that "the interest in legally protected private autonomy from government is not always connected with the interest in democratic self-governance."[257] This is the sum and substance of Sunstein's attack on the public/private distinction. Of course, Sunstein's alternative to "legally protected private autonomy from government" would subject private autonomy to direct and extensive public control through the government.[258] No matter how much this alternative is sugar-coated, the basic truth remains that, under such a system, politically powerful individuals and groups would be able to impose their views on the rest of society to an extent unheard of in the present constitutional regime. Sunstein is able to live with this result because he seems to view government (in the good civic republican tradition) as an ideologically pure body, aloof from the dirty realities of self-interest, self-dealing, self-aggrandizement and self-deception that plague the nongovernmental sectors of collective human activity. If this blithely benign conception of government is inaccurate—as I believe it demonstrably is—then Sunstein's deferential approach to speech regulation is hopelessly flawed.

---

[256] For the Meese Commission's contribution to the debate over "harm" vis-a-vis sexually explicit speech, see ATTORNEY GEN. COMM'N ON PORNOGRAPHY, U.S. DEPT. OF JUSTICE, FINAL REPORT 303 (1986) ("[W]e certainly reject the view that the only noticeable harm is one that causes physical or financial harm to identifiable individuals. An environment, physical, cultural, moral, or aesthetic, can be harmed, and so can a community, organization, or group be harmed independent of identifiable harms to members of that community.").

[257] Sunstein, *supra* note 83, at 277.

[258] *Id.*

III. POSTMODERN CENSORSHIP AND EGALITARIANISM

The third major cornerstone of postmodern censorship theory is the notion that constitutional restrictions on the regulation of antisocial speech should be reduced substantially to permit the government to advance the competing goals of racial, gender and social equality. There are several implicit assertions embedded within this claim. The first implicit claim of this equality theme asserts that the existence of speech advocating inequality is equivalent to inequality itself. This notion builds on the first and second themes of postmodern censorship theory discussed in previous sections—that speech about the world "constructs" the world, and that private speech should not be distinguished from public speech. The second implicit premise of the equality theme asserts that the term "equality" has a definitive meaning, which the government is capable of ascertaining and enforcing through legislation directed against speech that contravenes, opposes or rejects the government's definition of the term. The third implicit premise posits that the First Amendment is limited by the spirit, if not the letter, of the Thirteenth and Fourteenth Amendments. Thus, the postmodern censors propose to alter the constitutional landscape by insisting that constitutional amendments enacted subsequent to the adoption of the First Amendment have carved out an area of speech about "equality," which should be afforded reduced First Amendment protection.

Of the three main themes of postmodern censorship theory discussed in this Article, the equality theme is the most straightforward. By positing a direct conflict between free speech and equality, the postmodern censors are proposing nothing more radical than a traditional balancing test, under which the government would be permitted to make difficult judgments about two very important but competing social values. Many of the equality theme's implicit premises have been addressed already in the previous sections of this Article. The remaining elements of the equality theme follow a pattern common to most constitutional balancing analyses. Thus, a few examples of the equality theme from the three main strains of postmodern censorship theory are sufficient to illustrate the problems inherent in this aspect of the theory.

A. *The Details of the Equality Theme in Postmodern Censorship Theory*

The starting point for discussions of the equality theme in postmodern censorship literature is the claim that current constitutional doctrine contains a fundamental and possibly irreconcilable conflict between free speech and equality. As Charles Lawrence states the problem: "At the center of the controversy is a tension between the constitutional values of free speech and equality."[259] Catharine MacKinnon is even more pointed: "The law of equality and the law of freedom of speech are on a collision course in this country."[260]

The postmodernists do not merely view free speech as inconsistent with equality, but actually as a threat to equality in the sense that speech is used as a weapon to subjugate racial minorities, women and members of other outsider groups. From the postmodernists' perspective, free speech is not just an obstacle to solving the problem of social inequality, free speech *is* the problem (or at least a large part of it). For example, "[c]ross burning inflicts its harm through its meaning as an act which promotes racial inequality through its message and impact, engendering terror and effectuating segregation. Its damages to equality rights [are] not symbolic but real."[261] Likewise, "[p]ornography is the material means of sexualizing inequality; and that is why pornography is a central practice in the subordination of women."[262]

The postmodernists couple the notion that equality and free speech are competing, and probably irreconcilable concepts, with the argument that the courts have seriously misconstrued the proper balance between the two values. In short, the value of free speech has been given too much deference by the courts in deciding difficult cases where equality is an issue.

> [T]he First Amendment has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of speech—as if the upheaval that produced the Reconstruction Amendments did not move the ground under the expressive freedom, setting new limits

---

[259] Lawrence, *supra* note 12, at 434.

[260] MACKINNON, *supra* note 46, at 71.

[261] Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 805-06 (1991).

[262] Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 15 (1985).

> and mandating new extensions, perhaps even demanding reconstruction of the speech right itself.[263]

In contrast, the postmodernists would alter the constitutional equation by emphasizing values of equality much more heavily as a justification for imposing additional government restrictions on speech. In fact, postmodernists "see equality as a precondition to free speech, and [they] place more weight on the side of the balance aimed at the removal of the badges and incidents of slavery that continue to flourish in our culture."[264]

The postmodernists' concept of a stark antagonism between equality and free speech leads them to conclude that the courts have rejected the value of equality by protecting private speech that the postmodernists consider racist or sexist. According to MacKinnon, "there never has been a fair fight in the United States between equality and speech as two constitutional values, equality supporting a statute or practice, speech challenging it. . . . [P]ornography ordinances and hate crime provisions fail constitutional scrutiny that they might, with constitutional equality support survive."[265]

The postmodern censors explain the courts' rejection of equality by attributing to the courts a combination of bad faith and negative social conditioning. For example, MacKinnon asserts that

> it was the prospect of losing access to pornography that impelled the social and legal development of absolutism as a bottom line for the First Amendment, as well as occasional bursts of passionate eloquence on behalf of speech per se: if we can't have this, they seem to say, what can we have?[266]

In the same vein, Lawrence suggests that "our unconscious racism causes us (even those of us who are the direct victims of racism), to view the [F]irst [A]mendment as the 'regular' amendment—an amendment that works for all people—and the equal protection clause and racial equality as a special-interest amendment important to groups that are less valued."[267]

The most extensive discussion of what the postmodernists view as the psychology of free speech protection appears in Richard

---

[263] MACKINNON, *supra* note 46, at 71.

[264] Lawrence, *supra* note 12, at 467.

[265] MACKINNON, *supra* note 46, at 85.

[266] *Id.* at 89.

[267] Lawrence, *supra* note 12, at 474-75; *see also* Matsuda, *supra* note 29, at 2374-75 (arguing that "[l]egal protection of racism is seen in . . . the refusal to recognize the competing values of liberty and equality at stake in the case of hate speech").

Delgado's work. In one article, Delgado and coauthor Jean Stefancic argue that "[s]peech and equality are not separate values, but rather opposite sides of the same coin. Their interdependence arises because they are integral aspects of a more basic phenomenon, namely the interpretive community."[268] According to this view, communication depends on a shared set of values, perceptions and meanings that define the interpretive community. "Without such an interpretive community, communication is impossible."[269] The problem with First Amendment protection of free speech, Delgado and Stefancic assert, is that the Amendment's central value is provided by an interpretive community that excludes everyone but white males: "Blacks, women, gays and lesbians, and others were not part of the speech community that framed the Constitution and Bill of Rights. . . . Later, when they did speak, their speech was deemed incoherent, self-interested, worthy of scorn."[270] In this and other articles, Delgado argues that the linkage between the white male interpretive community and free speech is so strong that the First Amendment provides very little value to groups that are not part of the power structure. "[T]he history of the First Amendment, as well as the current landscape of doctrinal exceptions, shows that it is far more valuable to the majority than to the minority, far more useful for confining change than for propelling it."[271]

In the end, Delgado and the other postmodernists always return to the social constructionist argument to prove their point. According to Delgado,

> racism is, in almost all its aspects, a class harm—the essence of which is subordination of one people by another. The mechanism of this subordination is a complex, interlocking series of acts, some physical, some symbolic. Although the physical acts (like lynchings and cross burnings) are often the most striking, the symbolic acts are the most insidious.[272]

MacKinnon uses similar comparisons: "Pornography is not an idea any more than segregation or lynching are ideas, although both institutionalize the idea of the inferiority of one group to anoth-

---

[268] Delgado & Stefancic, *supra* note 158, at 856.
[269] *Id.*
[270] *Id.* at 862.
[271] Delgado & Yun, *supra* note 95, at 883.
[272] Delgado, *supra* note 138, at 383-84.

er. . . . In a feminist perspective, pornography is the essence of a sexist social order, its quintessential social act."[273]

The postmodernist response to this dilemma is to reduce both equality and free speech to what Delgado calls conflicting "narratives."[274] This approach manages to trivialize both equality and free speech by turning them into the plots of different "stories." Which of these rights gets respected depends on whose story gets told. And whose story gets told depends almost entirely on who has the power to command the platform provided by the government. Delgado is very clear about this position:

> My view is that both stories are equally valid. Judges and university administrators have no easy, a priori way of choosing between them, of privileging one over the other. They could coin an exception to free speech, thus giving primacy to the equal protection values at stake. Or, they could carve an exception to equality, saying in effect that universities may protect minority populations except where this abridges speech. Nothing in constitutional or moral theory requires one answer rather than the other. Social science, case law, and the experience of other nations provide some illumination. But ultimately, judges and university administrators must *choose*.[275]

Delgado wrote this statement in the context of discussing constitutional challenges to university speech codes. But the same analysis would necessarily apply to other government efforts to regulate speech. This approach thus returns us to the thread that unifies all the disparate themes of postmodern censorship theory: Postmodern censorship theory—like all other theories urging that the government should be permitted to regulate speech extensively—ultimately amounts to little more than an apologia for the free application of political power to squelch dissent. This entire Article is an attempt to challenge the wisdom of that view, but a few specific points with respect to the particulars of the postmodernists' equality theme are warranted here.[276]

---

[273] MACKINNON, *supra* note 37, at 204.

[274] Delgado, *supra* note 138, at 346-47.

[275] *Id.* at 348 (citations omitted).

[276] I have focused in this section on the critical race and feminist variants of postmodern censorship theory. I leave aside the civic republican version of the theory because Professor Sunstein has expressed some reluctance to rely as strongly on equality arguments as his fellow postmodernists. *See* Sunstein, *supra* note 83, at 300 n.137; Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 811-12 (1993) [hereinafter *Words, Conduct, Caste*]. He expresses skepticism, with which I concur, that the government could ever make judgments about relative power relationships that

B. *The Flaws in the Postmodern Censors' Speech/Equality Dichotomy*

Previous sections of this Article have dealt with the questionable theoretical underpinnings of the equality theme in postmodern censorship theory, in particular, the social constructionist arguments discussed in Part I. This section focuses on three other flaws—partly

---

were sufficiently reliable to justify "redistributing" speech. Sunstein, *supra* note 83, at 300 n.137. He also notes that:

> we should regard a decision to silence the views of the powerful as an objectionable interference with freedom, even if it might promote the goal of equality. Well-off people might not have any strong claim of right to distributions of wealth and property that the common law grants them; but surely they have a right to complain if they are silenced.

Id.

Although I shall not pursue the matter beyond this footnote, I note in passing two reasons why Sunstein's seeming concession to the value of free speech is not entirely reassuring. First, the passage quoted in the preceding paragraph is inconsistent with the overriding theme of the article in which that passage appears. The theme of that article is that the post-*Lochner* regulatory model should be applied to speech markets as well as economic markets. After having advocated collapsing the constitutional treatment of speech into the constitutional treatment of economic regulation, it is odd to have Sunstein suddenly endorsing what he calls "the most conventional Millian arguments for the distinctiveness of speech." *Id.*

Second, although in several articles Sunstein refuses specifically to rely on an equality argument to offset claims of free speech, he often hedges his bets. For example, in one article, after criticizing the equality argument, he notes that "[m]uch remains to be done on this difficult subject," Sunstein, *Words, Conduct, Caste, supra*, at 812, and then concludes that same article by making a specific overture to the equality argument:

> I suggest that narrow and well-defined legal controls on pornography and hate speech are simply part of the attack on systems of racial and gender caste. If they are understood in this light, and if they are appropriately narrow and clear, they can operate without making significant intrusions into a well-functioning system of free expression.

Id. at 844. In another article he translates the equality argument into "harm" terms, which permits him to avoid the difficulty of confronting the equality/free speech balance proposed directly by critical race and feminist postmodern theorists:

> A third harmful effect of pornography stems from the role it plays as a conditioning factor in the lives of both men and women. Pornography acts as a filter through which men and women perceive gender roles and relationships between the sexes. . . . The connection between inequality, unlawful discrimination, and pornography cannot be firmly established. But pornography undeniably reflects inequality, and through its reinforcing power, helps to perpetuate it.

Sunstein, *supra* note 202, at 601.

All of this sounds a lot like the other versions of the equality argument, and to the extent that Sunstein intends to endorse these views, the criticisms of the argument in the text applies to his version as well.

logical and partly practical in nature—in the postmodernists' equality arguments. First, if the structure of the postmodernists' argument is correct, then why should the courts not consider constitutional interests other than equality as potential justifications for reducing First Amendment protection of antisocial speech? Second, if the constitutional interest in equality can be used to reduce the protections offered individuals under the First Amendment, why should the same constitutional interest not also reduce the individual-rights protections offered by other parts of the Bill of Rights? Third, how can the postmodernists be sure that their view of the relationship between speech and equality is the correct one? Moreover, how can they be sure that their allies will be able to maintain the necessary political power to impose their particular view of equality indefinitely?

1. The Balance of Constitutional Interests and the Demise of the First Amendment

The core of the postmodernists' equality argument is the claim that the First Amendment is only one constitutional interest and should not be given precedence over equally important constitutional interests embodied in the Reconstruction Amendments. The postmodernists do not argue that equality should itself be given preeminent status under the Constitution, but only that the political branches should be permitted to consider equality values on the same level as First Amendment values when enacting legislation regulating speech. The postmodernists do not need to go beyond this argument because, having leveled the field of constitutional rights so that all constitutional interests are treated identically, government officials may, to use Delgado's phrase, simply "choose" which interests the government wants to prefer.[277]

The problem with this argument is that the government may not necessarily choose the interests the postmodernists favor. If all constitutional interests are equivalent, and if the courts should no longer consider the special functions served by particular constitutional rights when those functions interfere with the realization of other constitutional goals, then what is to keep the relevant officials from choosing any one of many other constitutional interests to offset the claims made on behalf of political and social dissenters seeking refuge under the First Amendment? The most prominent

---

[277] *See* Delgado, *supra* note 138, at 348.

interests that spring to mind are those related to national security. Combine the President's constitutional authority as Commander-in-Chief with Congress's war powers, apply the same logic used by the postmodernists to argue that antiwar speech advocating draft evasion significantly impedes the realization of constitutionally authorized social goals relating to armed conflict, and suddenly the 1919 Espionage Act decisions[278] no longer seem like dusty historical artifacts of a more repressive political era. Just as the postmodernists "see equality as a precondition to free speech, and . . . place more weight on that side of the balance,"[279] many people in and out of government undoubtedly would view constitutional authority relating to national security as a precondition to free speech and place more weight on *that* side of the balance.

The postmodernist equality argument in favor of an outright balancing approach to constitutional rights is not illogical, but its logic extends far beyond the postmodernists' own most cherished values. As soon as the free speech protection of the First Amendment is relegated to the status of one undifferentiated value among many, then any number of contrary values may be proposed as a justification for suppressing or sanctioning speech that contravenes a value favored by the government. Speech advocating violent labor action or socialist activism arguably impedes Congress's ability to regulate commerce (i.e., capitalist commerce) among the states; speech ridiculing the judicial system harms the federal courts' constitutional authority to command the respect they need to effectuate their judgments; advocacy of civil disobedience undermines the very notion of constitutional government, which must be defended for any of the more specific constitutional powers to serve their proper functions. According to the postmodernists' logic, the government should be permitted to suppress the speech involved in all of these examples to preserve the government's constitutional powers over commerce, the judiciary and democratic governance in general.

The postmodernists' logic also leads to another odd conclusion. If constitutional rights are no longer to be interpreted in light of their peculiar function in the political system, and instead are subject to being balanced by the government, ad hoc, against other constitutional values, then the government seemingly could free itself

---

[278] *See supra* note 246.

[279] Lawrence, *supra* note 12, at 467.

from its obligations under the Fourteenth Amendment simply by deciding to "choose" to emphasize some constitutional value other than equality. And in their defense, these newly empowered legislators could simply quote Delgado: "Nothing in constitutional or moral theory requires one answer rather than the other."[280] The choice is theirs to make, which is to say: Power is everything.

2. The Preeminence of Equality and the Demise of the Bill of Rights

There is a way around the dilemma of the leveled Constitution. The postmodernists could redefine their theory to include the assertion that the First Amendment must give way to equality because equality is the preeminent constitutional value. This is inconsistent with much of what the postmodernists explicitly assert about the equality theme, but it is consistent with the general tenor of those discussions, which clearly are intended to increase the value of equality arguments in constitutional disputes over antisocial speech. It is also consistent with statements to the effect that "equality [is] a precondition to free speech,"[281] which appear frequently in the postmodern censorship literature.

But this approach poses even more problems than the leveling approach to constitutional values. If equality is reconstituted as a constitutional trump card, which prevails every time it comes into conflict with another constitutional value, then virtually the entire range of liberty values protected by the Constitution are put at risk. The question is this: If the postmodernist conception of constitutional equality is sufficient to reduce the protection of the First Amendment, then why is it not also sufficient to reduce the protections of other amendments as well? Thus, the warrant requirement of the Fourth Amendment could be eliminated, or at least moderated, whenever the police had "good faith" suspicion that pornography was on a bookshelf inside a dwelling, or that a group of Nazi's was meeting at someone's house to discuss their theories of racial superiority. Likewise, the protection against self-incrimination provided by the Fifth Amendment might be eliminated for someone who was being asked to confess to membership in a racist group. Or perhaps prosecutors would be permitted to comment on a racist's refusal to take the stand to defend himself against charges brought

---

[280] Delgado, *supra* note 138, at 348.
[281] Lawrence, *supra* note 12, at 467.

under a hate-crimes statute. Or—to take this argument to a (hopefully) absurd end—the Eighth Amendment's restrictions on cruel and unusual punishments could be lowered just a bit for someone convicted of a hate crime. After all, if the First Amendment's embodiment of liberty, privacy and autonomy values may be sacrificed when they become impediments to the realization of equality, then the same should be true of those same values as embodied in other parts of the Bill of Rights.

The obvious problem here is that if the government is permitted to enact legislation pursuing equality through warrantless invasions of individual residences, or coerced confessions, or even torture, then we have converted the pursuit of a positive social value into a recipe for political tyranny. This is the major failing of the postmodernist censorship scheme in general, and the equality theme in particular: The theory fails to take into account the structural importance of the constitutional limitations on the use of political power for *any* end—even good ones. The end does not always justify the means, because the use of tyrannical means will often corrupt the end. Which brings us to the third problem with the equality theme: Having freed the government to pursue "equality," how can the postmodernists ensure that the government will always choose to pursue the correct form of "equality?"

3. The First Amendment Value of Equality

Equality means many things to many people. Affirmative action provides one obvious illustration—both opponents and proponents of affirmative action purport to defend "equality." Neither side of the affirmative action debate is wrong or intellectually dishonest in appealing to "equality" to support their position; the two sides of the debate merely define the term differently. In the context of affirmative action, the concept of "equality" merely sets the debate in motion, it cannot settle the issue.

The postmodernists use the term "equality" in a very specific manner. The key to the postmodernists' version of equality is that it is a *group* right, rather than an individual right. In other words, unlike traditional, "formal" equality, which proposes that different *individuals* should be treated equally, the postmodernists pursue a

vision of equality that requires different *groups* to be treated equally.[282] The postmodernists acknowledge that the requirements of individual equality and group equality will often conflict. Thus, it is not difficult for the postmodernists to articulate circumstances in which free speech—by definition an individual right—will interfere with the concept of equality defined in terms of social, racial or gender groups. This is the source of the postmodernist claim that there is some inescapable "tension between the constitutional values of free speech and equality."[283] Like all claims concerning equality, however, the postmodernists' definition of the term is subject to debate, and in order to prevail in their efforts to undermine traditional First Amendment protections, the postmodern censors must establish that their group-based model of equality should be applied to the sphere of intellectual freedom and expression.

Clarifying the meaning of "equality" removes a great deal of the rhetorical force behind postmodern censorship theory. It is one thing to paint your opponents as willing to sacrifice "equality" for mere speech. It is quite another to muster support for the notion that individual freedom must be sacrificed for the sake of group social parity of undefined dimensions. The postmodernists' rhetorical position is also weakened when confronted with the strong connotation of equality inherent in First Amendment law itself.

Contrary to the postmodernists' claims that free speech protections are intrinsically opposed to "equality," the concept of equality is at the very core of modern First Amendment jurisprudence. For many years, the Supreme Court has been very explicit about protecting intellectual equality: "There is an 'equality of status in the

---

[282] Lawrence recently drew this distinction between the traditional interpretation of equality and his view. His view

> is to think of racial equality as a substantive societal condition rather than as an individual right. The substantive approach sees the disestablishment of ideologies and systems of racial subordination as indispensable and prerequisite to individual human dignity and equality. The nonsubstantive approach sees the individual right to be treated without reference to one's race as primary. This individualist right is asserted unconstrained by reference to continuing societal conditions of inequality and it is privileged in relation to the eradication of those conditions. This privileging of individual rights over the goal of systemic change is what leads process theorists to see affirmative action as an "extraordinary remedy."

Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824-25 (1995) (citation omitted).

[283] Lawrence, *supra* note 12, at 434.

field of ideas,' and government must afford all points of view an equal opportunity to be heard."[284] This is the basis for the strong First Amendment presumption against content-based regulation of speech,[285] and the even stronger rule prohibiting government action discriminating against particular viewpoints.[286] The effect of these rules is to limit sharply the power of political majorities to punish the speech of those who do not have political power. These rules have the effect of equalizing the political playing field by providing benefits to those whose relatively weak political standing would not enable them to obtain those benefits otherwise. These egalitarian principles within First Amendment jurisprudence thus demonstrate that defending the value of free speech does not necessarily entail a renunciation of "equality" because the modern understanding of free speech is itself defined by equality.

Of course, this argument depends on an individualistic notion of "equality," with which the postmodernists disagree. But the First Amendment treatment of equality is not as far afield from the concerns expressed by postmodern censors as those theorists might have us believe. In particular, the First Amendment concern with equality is almost exclusively focused on the need to protect outsiders to the political process from oppressive applications of power by those who dominate the political process—which presumably is also the primary concern of the postmodernists.

The postmodernists claim that this First Amendment guarantee of equality in fact protects only a false equality because this guarantee ignores the inequality inherent in a physical reality in which "free" speech cannot truly exist. According to Catharine MacKinnon's version of this point, for example, existing constitutional doctrines "show virtually total insensitivity to the damage done to social equality by expressive means and a substantial lack of recognition that some people get a lot more speech than others."[287] This contention is subject to dispute on several levels.

---

[284] Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting MEIKLEJOHN, *supra* note 202, at 27) (overturning an ordinance prohibiting certain types of picketing in front of schools).

[285] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

[286] "Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors, 115 S. Ct. 2510, 2516 (1995) (invalidating a University's decision not to provide funding to a Christian newspaper).

[287] MACKINNON, *supra* note 46, at 72.

First, even if the postmodernist portrayal of private reality is correct, it is unclear how they would prevent that unequal private reality from reconstituting itself in a much more powerful form through control of the government. If the protections of the First Amendment were significantly reduced, as the postmodernists propose, nothing would prevent the very same political factions that have created the current social reality from gaining control of the government and using their newly enhanced authority over speech to entrench the present social system even more deeply by silencing the dissent of their opponents. Unless MacKinnon and the other postmodern censors are certain that they could command a perpetual political majority in this historically conservative country, it would be political suicide to dismantle one of the primary means (i.e., constitutionally protected free speech) by which they can try to force at least incremental change in the status quo.

Second, the postmodern claims on behalf of "equality" are asserted as if there is no room for honest debate about either the precise contours of this social objective, or the means for achieving it. The postmodernists assert in absolutist terms that the types of speech with which they disagree are unprotected because they are "wrong"[288] or "false,"[289] and that claims to the contrary are nothing more than the product of "unconscious racism."[290] The self-certainty of the postmodern censors on the subject of equality says something very disturbing about how they would behave if they ever obtained real political power in the absence of constitutional limits on the exercise of that power. Accusations of "collaboration" come a little too easily to the lips of the postmodern censors.[291] If the history of speech regulation has taught us anything, it is that citizens in a democracy should be both skeptical and fearful of well-intended true believers who seek to give themselves unfettered power to remake the world.

Finally, the notion that the postmodernists are defending true, "concrete" equality against the false and inherently oppressive "abstract" reality[292] of modern First Amendment jurisprudence does

---

[288] Matsuda, *supra* note 29, at 2380.

[289] MACKINNON, *supra* note 46, at 107.

[290] Lawrence, *supra* note 12, at 475; *see also* Matsuda, *supra* note 29, at 2374-75 (arguing that "[l]egal protection of racism is seen in . . . the refusal to recognize the competing values of liberty and equality at stake in the case of hate speech").

[291] *See* CATHARINE A. MACKINNON, *On Collaboration*, *in* FEMINISM UNMODIFIED, *supra* note 34, at 198-205 (attacking feminist lawyers who oppose her antipornography stance).

[292] *See* MACKINNON, *supra* note 46, at 109 (suggesting that the current model of

not accurately describe how the system of free speech protection actually works. A particularly egregious manifestation of this inaccuracy is Richard Delgado's claim that modern First Amendment doctrine is the product of an interpretive community dominated by white males, which has generated a constitutional right that is "far more valuable to the majority than to the minority."[293]

One wonders how compelling Ken Saro-Wiwa would have found such claims.[294] Or Daw Aung San Suu Kyi.[295] Or Zhang Yimou.[296] None of these political and artistic dissidents are (or, in

---

free speech be replaced with one in which "principle will be defended in terms of specific experiences, the particularity of history, substantively rather than abstractly").

[293] Delgado & Yun, *supra* note 95, at 883.

[294] Mr. Saro-Wiwa was a prominent Nigerian poet, newspaper columnist and environmentalist, who spoke out for many years as one of the Nigerian government's most effective critics. He was hanged by the government last year, after being convicted on murder charges that are widely assumed to have been fabricated as a way of permanently silencing Nigeria's foremost dissident. *See* Howard W. French, *Nigeria Executes Critic of Regime: Nations Protest*, N.Y. TIMES, Nov. 10, 1995, at A1. According to reports from Nigeria, Mr. Saro-Wiwa was starved for three days before being executed. *See* Cameron Duodu, *Hanged Activists Were Starved*, OBSERVER, Nov. 19, 1995, at 24. Because of "faulty equipment," it took the Nigerian hangman five attempts to kill Mr. Saro-Wiwa. *See* Bob Drogin, *Mandela to Seek Oil Embargo Against Nigeria Military Regime*, L.A. TIMES, Nov. 16, 1995, at A12. A testament to the ease of silencing writers, and yet to the futility of government attempts to silence their work, Mr. Saro-Wiwa's famous antiwar novel *Sozaboy* was published in the United States in 1994 and is still in print.

[295] Ms. Aung San Suu Kyi is the leader of the democracy movement in Myanmar. Detained by her government under house arrest for six years, she was finally released in July 1995. *See* Philip Shenon, *Head of Democratic Opposition Is Released by Burmese Military*, N.Y. TIMES, July 11, 1995, at A1. Ms. Aung San Suu Kyi's opponents in the government of Myanmar are more amenable than she is to the postmodernist position on civil liberties such as free speech. At a meeting of the Association of Southeast Asian Nations, Myanmar Foreign Minister, U Ohn Gyaw, stated: "We respect the norms and the ideals of human rights . . . [b]ut as in any other country in Southeast Asia, we have to take into consideration our culture, our history, our ethos. What is good in other countries cannot be good in our country." Seth Mydans, *Burmese Junta Seems Headed for Showdown*, N.Y. TIMES, Sept. 2, 1996, at A2. Underscoring the Foreign Minister's point, in September 1996 the Myanmar government once again blockaded Ms. Aung San Suu Kyi's house, prevented her from making her weekly address to the nation, and arrested hundreds of her supporters. *See* Seth Mydans, *Burmese Military Tightens Crack Down on Democracy Leader*, N.Y. TIMES, Sept. 30, 1996, at A5.

[296] Mr. Zhang is a Chinese film director, who was "requested" by his government to drop his plans to attend the New York Film Festival in 1995 because the festival intended to show a documentary about the government's attack on students in Tiananmen Square. *See* William Grimes, *Beijing Thwarts U.S. Film Festival*, N.Y. TIMES, Sept. 27, 1995, at C11. This is only the latest sanction that the Chinese government has imposed on Zhang. The government has deemed Zhang's film "Ju Dou" unfit for Chinese audiences because of its sexual content, and to date, neither that film nor "Raise the Red Lantern" has been released in China. *See id.* The government

the case of Mr. Saro-Wiwa, were) Euro-American males, but each one of them has been forced to understand at the most basic level the reality of a political system that is unburdened by the structural protections of individual liberty—protections that the postmodernists find so unnecessary and culture-bound. Postmodernist claims to the contrary, these examples demonstrate that there is nothing about the excessive use of power over intellectual activity (or personal freedom generally) that is tied to any particular "interpretive community."[297] Dissidents of every political tendency and every race in every community of the world suffer in exactly the same way when they are subjected to the unconstrained application of raw political power. A constitutional system that prevents the majority from bringing the entire force of the state down on one lone dissenter because of that dissenter's speech cannot plausibly be described as a system that is "far more useful for confining change than for propelling it."[298] Just ask the widow of Ken Saro-Wiwa.

CONCLUSION: THE NEW CENSORSHIP AND THE POSTMODERN FANDANGO

The "postmodernist" moniker that I have attached to the new generation of censors discussed in this Article is intended to be partly serious and partly ironic. The serious aspect of the "postmodern" classification refers to three main characteristics of the new censors' work. First, the new censors share with their "postmodern" colleagues in other academic disciplines a rejection of the modernist rationalism that represents the essential spirit of the Enlightenment.[299] Of course, this modernist rationalism is also the basis of

---

prohibited Mr. Zhang from attending the Cannes Film Festival in 1994 because one of his films presented a critical view of the Cultural Revolution, and as further punishment for that infraction, the government temporarily shut down production of Mr. Zhang's film "Shanghai Triad." *See id.*

[297] *See* Delgado & Stefancic, *supra* note 158, at 856.

[298] Delgado & Yun, *supra* note 95, at 883.

[299] Georges Bataille and Michel Foucault are two of the most commonly cited exemplars of this aspect of nonlegal postmodernism. *See* GEORGES BATAILLE, THEORY OF RELIGION (1989) (positing incompletion and impossibility as truths of the human situation); GEORGES BATAILLE, VISIONS OF EXCESS (1985) (embracing the "heterogeneous"—animality, flies, excrement—in rebellion against "reason"); MICHEL FOUCAULT, THE ORDER OF THINGS (1973) (challenging the Western classical ordering of knowledge in order to restore the reality of instability and flaws); MICHEL FOUCAULT, POWER/KNOWLEDGE (1980) (postulating the mutual interaction and interdependence of power and knowledge). It is worth noting that near the end of his life, Michel Foucault began to view the Enlightenment and that period's

both the First Amendment and liberal constitutionalism generally. Second, the new censors share with their cultural postmodernist counterparts a tendency toward millenarianism—that is, a sense that they are heralding a new, more righteous era in constitutional theory that will fundamentally alter all existing doctrine.[300] Third, there is a certain degree of faddishness in the new censorship, which is also evident in other forms of cultural postmodernism. It is the latest batch of raw material for the academic cottage industry of symposia and conferences, in which participants spend hours, if not days, nodding solemnly in deep consideration of the shiny new academic toy.

The ironic aspect of the term "postmodern censors" is a reference to the fact that these legal postmodernists exhibit a very unpostmodernist single-mindedness in seeking to justify the uses of legal authority and political power to constrain and channel human discourse. The nonlegal postmodernists would have little patience with this aspect of postmodern censorship theory. The nonlegal postmodernists set themselves against all "totalizing" or reductivist attempts to describe discourse and its effects.[301] The postmodern censors, on the other hand, have determined precisely what "bad" discourse entails, and they know precisely how to fix it.

For all their postmodernist trappings, the new censors disagree vehemently with the central tenets of postmodern thought in the cultural sphere—the equality of all ideas, the malleability of values, and the inherent instability of all cultural, political and legal hierarchies. In contrast to the cultural postmodernists, the postmodern censors are almost Victorian in their insistence on certain moral

---

characteristic emphasis on rationalism in a more positive light. *See* Michel Foucault, *What Is Enlightenment?*, *in* THE FOUCAULT READER 32-50 (Paul Rabinow ed., 1984) (characterizing the Enlightenment's ethos of philosophical interrogation in both a negative and a positive light).

[300] Foucault is, once again, a good nonlegal example of this trait. He immodestly claimed that "a new form of history is trying to develop its own theory," MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 5 (1972) (contemplating the indigenous transformation of historical knowledge), and he presented himself as history's happy handmaiden in that effort. Unfortunately, he was never able to provide much in the way of detail about this new theory, beyond the vague notion that "something new is about to begin, something we glimpse only as a thin line of light low on the horizon." FOUCAULT, THE ORDER OF THINGS, *supra* note 299, at 384.

[301] *See generally* FOUCAULT, POWER/KNOWLEDGE, *supra* note 299 (extensively critiquing Marxism and psychoanalysis); *see also* FOUCAULT, THE ORDER OF THINGS, *supra* note 299, at xiv (admonishing that "[d]iscourse . . . is so complex a reality that we not only can, but should, approach it at different levels with different [analytic] methods").

and political absolutes: Some ideas are better than others, central values (equality, for example) are eternal, and the legal/political hierarchy should be given the authority to enforce these eternal verities with civil (and in some circumstances criminal) sanctions against those who disagree through antisocial speech. Many of the new censorship themes discussed in this Article—especially those on the construction of reality through language, and the collapse of the private into the public—reflect the postmodern mindset while contradicting the essence of postmodernism. This poor attempt to cloak censorship with a postmodern mantle brings us full circle to a point made at the beginning of this Article: that postmodern censorship arguments are but refurbished versions of the same arguments historically used to silence antiwar protesters and socialists—the same arguments used to justify previous government efforts to control speech. Postmodern censorship theory adds nothing substantial to the list of reasons for censoring speech. At best, the new generation of censors have managed to repackage in postmodernist clothing society's recurring fear of the verbal cacophony produced by a raucously diverse culture. And despite the best efforts of the new censors to demonstrate the contrary, there is simply nothing very postmodern about fear.